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EDITOR'S NOTE

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No. 86-526-CFX
Status: GRANTED

Title: Caterpillar Inc., et al., Petitioners
v.
Cecil Williams, et al.

Docketed:
September 29, 1986

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Scholick, Gary P., Skoning, Gerald D.

Counsel for respondent: Wollett, Fritz

Entry	Date	Note	Proceedings and Orders
1	Sep 29 1986	E	Petition for writ of certiorari filed.
2	Oct 23 1986		Brief of respondents Cecil Williams, et al. in opposition filed.
3	Oct 28 1986	G	Motion of Merchants and Manufacturers Association for leave to file a brief as amicus curiae filed.
4	Oct 29 1986		DISTRIBUTED. November 14, 1986
5	Nov 4 1986	X	Reply brief of petitioner Caterpillar Inc., et al. filed.
6	Nov 17 1986		Motion of Merchants and Manufacturers Association for leave to file a brief as amicus curiae GRANTED.
7	Nov 17 1986		Petition GRANTED.
			**********
9	Dec 22 1986		Order extending time to file brief of petitioner on the merits until January 16, 1987.
10	Jan 16 1987		Brief amicus curiae of Union Pacific Railroad Co. filed.
11	Jan 16 1987		Brief amicus curiae of Equal Employment Advisory Council filed.
12	Jan 20 1987		Joint appendix filed.
13	Jan 20 1987		Brief of petitioner filed.
14	Jan 16 1987		Brief amicus curiae of Merchants and Manufacturers Assn., et al. filed.
15	Jan 16 1987		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
17	Jan 27 1987		Order extending time to file brief of respondent on the merits until March 5, 1987.
18	Feb 11 1987		Record filed.
19	Feb 11 1987		Certified copy of original record and proceedings, 2 volumes, received.
20	Mar 5 1987		Order further extending time to file brief of respondent on the merits until March 9, 1987.
21	Mar 4 1987		Brief amicus curiae of Plaintiff Employment Lawyers Assn. filed.
22	Mar 9 1987		Brief of respondents Cecil Williams, et al. filed.
23	Mar 9 1987		Brief amicus curiae of AFL-CIO filed.
24	Mar 9 1987		Brief amicus curiae of Employment Law Center of San Francisco Legal Aid filed.
25	Mar 13 1987		CIRCULATED.
26	Mar 11 1987		SET FOR ARGUMENT. Tuesday, April 21, 1987. (1st case).
27	Apr 4 1987	X	Reply brief of petitioners Caterpillar Inc., et al. filed.
28	Apr 21 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-526

No.

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, KEITH WHEELER,

Petitioners,

vs.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE and JOEL BRYAN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GARY P. SCHOLICK
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: (415) 433-1940
Attorneys for Petitioners Caterpillar Inc., Robert Gilmore, Don Fowler, Jeffrey Glickman, A. E. Mathisen, and Keith Wheeler

September 30, 1986

ROWNE OF SAN FRANCISCO INC • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether state law causes of action are completely preempted by section 301 of the Labor-Management Relations Act, or otherwise within the scope of section 301, thus permitting removal, where (1) the resolution of the state claims requires reference to, and the interpretation of, a collective bargaining agreement, and (2) the plaintiff, a member of a bargaining unit and covered by a collective bargaining agreement, contends that he was wrongfully discharged because he was satisfactorily performing his bargaining unit work, and because prior to entering the bargaining unit, he negotiated an individual employment contract which entitled him to continued employment on terms and conditions different from those set forth in the collective bargaining agreement.

RULE 28.1 STATEMENT

Caterpillar Inc., whose name was Caterpillar Tractor Co. at the time the instant lawsuit was filed, has no parent company. Its non-wholly owned subsidiaries and affiliates are: Advanced Technology Services, Inc.; C.D. High Technology, Inc.; Fared Robert Systems, Inc.; Industrial Lasers Inc.; Equipment Financing Associates, a partnership; Turbo Techcomercio e Servicos de Manutencao de Turbinas Ltda. (Brazil); Caterpillar Mitsubishi Ltd. (Japan); Tractor Engineers Limited (India) and P. T. Natra Raya (Indonesia).

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No.

In the Supreme Court

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United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, KEITH WHEELER,

Petitioners,

VS.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE and JOEL BRYAN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit, rendered in these proceedings on June 12, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 786 F.2d 928, and is reproduced in Appendix A, *infra,* A-1—A-19. The Opinion of the District Court is unreported, and is reproduced in Appendix B, *infra,* A-20—A-30.

JURISDICTION

The initial decision of the Court below issued on April 7, 1986. Petitioners filed a timely Petition For Rehearing And Suggestion For Rehearing *En Banc* on May 5, 1986, after the time for filing the Petition was extended by the Court of Appeals. On June 12, 1986, the Court of Appeals issued an Amended Decision, the subject of the instant Petition For A Writ Of Certiorari. On June 19, 1986, Petitioners filed a timely Petition For Rehearing And Suggestion For Rehearing *En Banc* with respect to the Court's June 12, 1986 Amended Opinion. Both Petitions For Rehearing And Suggestions For Rehearing *En Banc* were denied by the Court of Appeals in an order dated August 7, 1986, which is reproduced in Appendix C, *infra*, A-31. Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the removal statutes, 28 U.S.C. sections 1441 (a), (b) and (c), and the Labor-Management Relations Act of 1947, 29 U.S.C. sections 171 (b), 173 (d) and 185 (a) are set forth in Appendix E, *infra*, A-100, A-101.

STATEMENT OF THE CASE

The gravamen of Respondent Cecil Williams' (herein "Williams") claim is that before he joined a bargaining unit covered by a collective bargaining agreement, Petitioner Caterpillar Inc. (herein "Caterpillar") promised Williams that if he was in the bargaining unit when Caterpillar closed its San Leandro, California plant, and if he performed his bargaining unit work satisfactorily, he would be transferred to another Caterpillar facility, and not terminated, notwithstanding any different terms or conditions of employment set forth in the collective bargaining agreement.[1]

[1] This action was brought by 15 other plaintiffs similarly situated to Williams. If removal jurisdiction existed for any one claim or for any one of the 16 Plaintiffs, removal was proper. *Franchise Tax Board v. Laborers Vac. Trust*, 463 U.S. 1, 13 (1983); 28 U.S.C. § 1441(c). The statement of the case will thus focus on Respondent Williams.

Williams thereafter joined the bargaining unit. Five years later, Williams was terminated when the plant closed. Williams filed a California Superior Court lawsuit protesting his termination, alleging state law contract and tort causes of action.

The Ninth Circuit Court of Appeals held that Williams' state court complaint was not removable as a claim arising under section 301 because it was based on a "pre-existing independent contract" (App. A-16, n.6). The Court of Appeals acknowledged that if the independent contract had been entered into after Williams joined the bargaining unit, or on the same day that he joined the unit, the claim would have been removable on the ground that the independent contract was merged and subsumed into the collective bargaining agreement. *Id.* However, because the complaint alleged a pre-existing independent contract, i.e., "entered into outside of the bargaining unit", the Court of Appeals held that Caterpillar's arguments pertaining to merger and federal preemption were "defensive allegation[s]", and, therefore, the action was not removable under 28 U.S.C. section 1441.

A. The Facts

Caterpillar hired Williams in 1965. For the first 11 years of his employment, he was a bargaining unit employee covered by a collective bargaining agreement. He then transferred to the weekly payroll for eight months, the management payroll for three years, and due to a business downturn, he returned to the bargaining unit in June 1980. He was covered by a collective bargaining agreement during the last five years of his employment, through spring 1985, at which time, due to the closure of Caterpillar's San Leandro plant, he was terminated pursuant to the terms of the collective bargaining agreement (Appendix D, p. A-33, A-34, A-98).[2]

[2] The Court of Appeals inexplicably stated that Williams was "discharged shortly after the San Leandro facility closed in *1983*" (App. A-3). The record establishes that the discharge and plant closure did not occur until mid 1985 (App. A-33, A-34, A-98).

His lawsuit protests his discharge *from the bargaining unit* on the grounds that he was performing his bargaining unit work satisfactorily, and that prior to entering the bargaining unit—during the relatively brief period in which he was employed as a weekly and management employee—he negotiated an agreement with Caterpillar whereby, irrespective of the terms of the collective bargaining agreement, he would be transferred to another Caterpillar facility upon plant closure. (App. A-40, A-43—50.)

In May 1983, some three years *after* Williams returned to the bargaining unit, he entered into another employment contract with Caterpillar. This contract, a collective bargaining agreement negotiated by the International Association of Machinists, AFL-CIO (herein "Union") on Williams' behalf and as his "sole bargaining agent," provided that Williams (1) could be terminated for just cause, (2) Caterpillar could decide whether work would be performed at the San Leandro plant, (3) should Caterpillar decide to close the San Leandro plant, Williams would not be transferred elsewhere, that he would be terminated, and that he would receive a lump sum severance payment based upon his hourly, weekly, and management employment with Caterpillar, and (4) should any dispute arise regarding working conditions covered by the agreement or the application or interpretation of the agreement, the matter would be resolved by binding arbitration (App. A-62, A-64, A-65, A-74—76).[3]

In December 1983, Caterpillar announced that it would close its San Leandro plant in mid 1985. In December 1984, instead of filing a grievance under the contractually established procedure, Williams filed a complaint in the Superior Court of the State of California, County of Alameda, against Caterpillar and five of its managers, Messrs. Gilmore, Fowler, Glickman, Mathisen and

[3] On December 14, 1983, March 15, 1984, and June 27, 1984, Caterpillar and the Union, on Williams' behalf, amended the May 1983 collective bargaining agreement specifically with regard to the closure of the San Leandro plant and the rights and benefits to be accorded to Williams and other employees due to the plant closure (App. A-81, 82, 91).

Wheeler, alleging that his termination from the bargaining unit was tortious and in breach of his "wholly independent" individual employment agreement (App. A-49).

B. The Federal Court Proceedings

Caterpillar timely removed Williams' complaint to the United States District Court for the Northern District of California. On March 15, 1985, the District Court held that removal was proper. The court concluded that the complaint stated a federal claim arising under section 301, recharacterized the complaint as a section 301 claim, and granted Caterpillar's motion to dismiss and provided Williams with leave to amend. Williams chose not to amend, and timely filed an appeal with the Court of Appeals.

The Ninth Circuit reversed the District Court. The Court of Appeals stated that removal jurisdiction based on preemption is proper only "when federal law provides both a superseding remedy replacing the state law cause of action *and* preempts that state law cause of action" (App. A-7). The Court found that "[s]ection 301 does not provide [Williams] any cause of action for the injury [he] allege[s,] [and] [c]onsequently federal jurisdiction is lacking whether or not the state law cause of action is preempted" (App. A-17, A-18).

In the Ninth Circuit's view, a state law cause of action should not be recharacterized as a section 301 action subject to removal even when "reference to a collective bargaining agreement may prove necessary to adjudicate the merits of the case" (App. A-15 n.5). The Court reasoned that Caterpillar's contentions "that the collective bargaining agreement must be referred to in determining whether the independent contracts to provide permanent employment are inconsistent with, and thus are superseded by and merged into, the bargaining agreement" were, even if true, "defensive allegation[s]," and thus insufficient to establish removal jurisdiction.

REASONS FOR GRANTING THE WRIT

This decision is in conflict with Supreme Court and Courts of Appeals decisions concerning the scope of section 301 jurisdiction

and the removability of section 301 actions. It presents a conflict between individual rights and remedies under state law and rights and immunities under collective bargaining agreements, issues which have not been directly addressed by this Court since *J.I. Case v. NLRB,* 321 U.S. 332 (1944). Since *J.I. Case,* however, a new body of state law has developed which has greatly expanded the remedies available to employees claiming unjust discharge.[4] According to the Court of Appeals, when employees covered by collective bargaining agreements seek to invoke these new state law remedies by asserting "pre-existing" individual contracts, their wrongful discharge claims cannot be removed to federal district courts, and state courts must decide whether, and to what extent, their claims are preempted by federal labor law. These are federal questions, however, which require for their resolution analysis of the terms of collective bargaining agreements and the scope of a union's authority to negotiate the provisions of collective bargaining agreements. Under 28 U.S.C. section 1441, Petitioners were entitled to have these important federal labor law questions decided in federal court.

I. The Court Of Appeals Decided Important Federal Questions Relating to Removal Jurisdiction and Section 301 of the Labor-Management Relations Act in a Way in Conflict With Applicable Decisions of This Court and Other Federal Courts Of Appeals

In *Franchise Tax Board v. Laborers Vac. Trust,* 463 U.S. 1 (1983), the Court held, unanimously, that removal jurisdiction exists if a federal cause of action completely preempts a state cause of action:

> *Avco* [a section 301 action] stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law [and is thus removable under 28 U.S.C. § 1441].

463 U.S. at 23-24.

[4] *See, e.g.,* Steiber, *Recent Developments in Employment at Will,* 36 Lab. L.J. 557, 559-60 (1985); Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s,* 40 Bus. Law 1 (1984); *Toussaint v. Blue Cross and Blue Shield of Michigan,* 408 Mich. 579, 292 N.W. 2d 880 (1980); *Pugh v. See's Candies, Inc.,* 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

The Court distinguished ERISA actions from section 301 actions, indicating that removal jurisdiction under section 301 was broader: "[A]ny action to enforce an agreement within the scope of § 301 would be controlled by federal law." 463 U.S. at 23, citing *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 103-104 (1962). The Court explained that state actions alleging violations of labor contracts are displaced entirely by section 301, "that the preemptive force of section 301 is . . . powerful," and that any state action coming within the scope of section 301 was removable to federal district court:

> It may be that, as with § 301 as interpreted in *Avco,* any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law.

463 U.S. at 24.

More recently, in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 220, 85 L. Ed. 2d 206, 221, 105 S. Ct. 1904 (1985), the Court held, unanimously, that a state action came within the scope of section 301, and was preempted by section 301, whenever its resolution was substantially dependent upon analysis of the terms of a collective bargaining agreement: "when resolution of a state-law claim is substantially dependent upon analysis of the terms of [a labor] contract, that claim *must* either be treated as a section 301 claim (citation omitted) or dismissed as pre-empted by federal labor-contract law" (emphasis added). The Court further explained that state lawsuits involving "the relationships created by [a collective bargaining] agreement," or which attempted to define the meaning or scope of the bargaining relationship, were also within the preemptive scope of section 301. 471 U.S. at 210-211.

The Court did not state, nor suggest, that such state lawsuits were only partially preempted by section 301. The holding was

that such lawsuits were "really" section 301 actions ("[they] must . . . be treated as a section 301 claim"), and that, therefore, they were entirely preempted by section 301. 471 U.S. at 220.

Taken together, these cases establish that when resolution of a state claim is substantially dependent upon the terms of a collective bargaining agreement, or the state claim purports to define the meaning or scope of the labor contract relationship, the claim must be treated as a section 301 claim, i.e., a state claim "within the scope of" section 301, and thus removable to federal district court. *Franchise Tax Board,* 463 U.S. at 24.

Williams' claims come within the scope of section 301 because their resolution "is substantially dependent upon analysis of the terms of [a labor] contract." *Lueck,* 471 U.S. at 220. It is a universally accepted principle of contract construction that when two contracts exist dealing with the same subject matter, the two contracts *must* be interpreted together. 6, *Corbin On Contracts,* 198, 212-13, § 1293, 1296 (1962).

> A difficult question of interpretation may arise when a second contract deals with the same subject matter as did the first contract made by the same parties, but does not state whether or to what extent it is intended to operate in discharge or substitution. *The two contracts must be interpreted together.* Insofar as they are inconsistent, the later one prevails; the remainder of the first contract, being quite consistent with the second in substance and purpose may be enforced.

Id., at § 1293, p. 198 (emphasis added).

As the individual contract and the instant labor contract, "must be interpreted together," Williams' claims are "substantially dependent upon analysis of the terms of [a labor] agreement," and thus "must . . . be treated as a section 301 claim." *Lueck,* 471 U.S. at 220. Accordingly, the complaint was removable. *Franchise Tax Board,* 463 U.S. at 24-25; *Lueck,* 471 U.S. at 220.

A time tested principle of federal labor law also establishes that Williams' claims must be treated as a section 301 claim: a pre-existing or co-existing individual employment contract, to the

extent of conflict, is extinguished and supplanted by a later negotiated collective bargaining agreement. *J.I. Case v. NLRB,* 321 U.S. 332, 337, 339 (1944) ("We know of nothing to prevent the employee . . . [from] making any contract *provided it is not inconsistent with a collective agreement*"); *Malia v. RCA Corp.,* 794 F.2d 909, 913 (3rd Cir. 1986);[5] *Pale v. General Telephone Co. of California,* 795 F.2d 775, 779 (9th Cir. 1986); *Olguin v. Inspiration Consol. Copper Co.,* 740 F.2d 1468, 1474 (9th Cir. 1984); *Eitmann v. New Orleans Public Service, Inc.,* 730 F.2d 359, 361-63 (5th Cir. 1984), *cert. denied,* 83 L. Ed. 2d 359 (1984); *Manning v. Bouton,* 678 F.2d 13, 15 (3rd Cir. 1982) ("Our conclusion that the negotiation of the collective bargaining agreement supplanted *any pre-existing individual contracts* is consistent with the policy underlying . . the federal . . . labor laws"); *Lewellyn v. Fleming,* 154 F.2d 211, 213 (10th Cir. 1946); *Trigo v. Eastern Air Lines, Inc.,* 440 F. Supp. 983 (D.C.P.R. 1976). To determine the extent of conflict between the individual contract, which allegedly covered the issues of plant closure, transfer, and termination, and the labor contract, which covered the same issues, and to apply the *J.I. Case* principle, a court must analyze "the terms of an agreement made between the parties [to] a labor contract." *Lueck,* 471 U.S. at 220. Under *Lueck,* therefore, "that claim must . . . be treated as a section 301 claim," and as such, the state claim "arose under" section 301 and was removable. *Franchise Tax Board,* 463 U.S. at 23-25.

The Court of Appeals' decision is in conflict not only with the federal removal and section 301 principles set forth in *Franchise Tax Board* and *Lueck,* it is also in conflict with the numerous Courts of Appeals which have applied, in the removal context, the *Lueck* definition of a section 301 claim, i.e., a state law claim substantially dependent upon analysis of the terms of a collective bargaining agreement: *see e.g., Truex, et al. v. Garrett Freightlines, Inc.,* 784 F.2d 1347, 1349-50 (9th Cir. 1985) (removal

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[5] "Nor does LMRA prevent an individual—whether an applicant for new employment *or a current employee in a supervisory position—from negotiating for a job in a bargaining unit so long as that employment will be on the terms and conditions set forth in the collective bargaining agreement.*" (Emphasis added.) 794 F.2d at 913.

jurisdiction exists because the state "contract theory implicat[ed] the collective bargaining agreement"); *Bale v. General Telephone Co. of California,* 795 F.2d at 776 (state claims preempted where "adjudication of . . . claims would require reference to, and interpretation of, the terms of [the collective bargaining] agreement"); *Bell v. Gas Service Co.,* 778 F.2d 512, 516-18 (8th Cir. 1986); *Hillard v. Dobelman,* 774 F.2d 886, 887 (8th Cir. 1985); *Mitchell v. Pepsi-Cola Bottlers, Inc.,* 772 F.2d 342 (7th Cir. 1985) (a dispute which "implicated a collective bargaining agreement" under the rationale of *Lueck* "presented a federal question and removal to federal court was proper"); *Harper v. San Diego Transit Corp.,* 764 F.2d 663, 670 (9th Cir. 1985) (concurring opinion). Similar holdings are found in cases decided even before *Lueck*: *Oglesby v. RCA Corp.,* 752 F.2d 272, 276 (7th Cir. 1985) ("where the preemptive effect of federal legislation is so complete as to exclude from application all state law on the subject, a case is removable regardless of the manner in which it has been alleged in the state court"); *Eitmann v. New Orleans Public Service, Inc.,* 730 F.2d at 365; *Olguin v. Inspiration Consol. Copper Co.,* 740 F.2d at 1474; *Schroeder v. Trans World Airlines, Inc.,* 702 F.2d 189, 191 (9th Cir. 1983) (where state action involves "topics . . . discussed in the collective bargaining agreement" and the interpretation of a federal labor statute is essential to the state claim, removal is proper); *Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209, 1211 (9th Cir. 1980); *Magnuson v. Burlington Northern, Inc.,* 576 F.2d 1367 (9th Cir. 1978), *cert. denied,* 439 U.S. 930 (1978).

The Court of Appeals indicated that the *Lueck* definition of a section 301 claim was not relevant to the question of whether Williams' state claims were within "the scope of section 301" or "completely preempted" by section 301. It believed that its own decision in *Painting and Decorating Contractors Association v. Painters and Decorators Joint Committee,* 707 F.2d 1067, 1071 (9th Cir. 1983), decided prior to *Lueck,* provided the correct definition of what constitutes the scope of section 301 or complete preemption under section 301, and that Williams' complaint did not fit that definition (App. A-14). This manifest disregard for the *Lueck* holding, and the confusion it will create in the lower

courts, is reason itself for Supreme Court review. Rule 17.1(a), Rules of the Supreme Court of the United States.

The Court of Appeals' belief that Williams' claims were not "completely preempted" was based on its erroneous view that preemption would not provide Williams with a superseding, alternative federal remedy (App. A-14, 17).[6] However, as explained in *Lueck,* because Williams' claims directly and substantially implicated the collective bargaining agreement and the collective bargaining relationships, his claims *must* be treated as a section 301 lawsuit. 471 U.S. at 210, 220. He may not prefer to litigate under section 301, and he may not prefer the range of remedies available under section 301, but that is his alternative federal remedy. *Olguin,* 740 F.2d at 1474; *Eitmann,* 730 F.2d 365. The Court of Appeals concluded otherwise because it confused the merits of Williams' claims under section 301 (e.g., his agreement in the labor contract that he could be terminated upon plant closure) with the question of whether he had an alternative federal cause of action, i.e., section 301. *See, e.g., Truex v. Garrett Freightlines, Inc.,* 784 F.2d at 1351 (even though plaintiff cannot prevail or bring a grievance under language of labor contract, the issue is addressed by the contract and thus "inextricably intertwined with a construction of the collective bargaining agreements"); *Mason v. Continental Group, Inc.,* 763 F.2d 1219, 1224 (11th Cir. 1985). The question under *Franchise Tax Board* and *Lueck* is not whether Williams will prevail under section 301; it is whether his state claims came within the scope of section 301. As the answer to that question is affirmative, his complaint was removable.

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[6] In *Franchise Tax Board,* this Court did not define "complete preemption" as requiring an alternative federal remedy. The Court noted that an alternative remedy was available in *Avco.* 463 U.S. at 26. The Court of Appeals recognized that commentators have not read such a requirement into the *Franchise Tax Board* definition of "complete preemption" (e.g., Comment, Federal Preemptive Removal Jurisdiction, and the Well-Pleaded-Complaint Rule, 51 U. Chi. L. Rev. 634 (1984)), but chose not to follow this reasoning. (App. A-7, n.2). In any event, an alternative federal cause of action exisits in this case.

By remanding these federal questions to state courts and juries, the decision below threatens the national labor law policy of "interpretive uniformity and predictability" with regard to collective bargaining agreements and relationships (*Lueck*, 471 U.S. at 211; *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962)), and encourages artful pleading: under the Court of Appeals' holding, any employee covered by a collective bargaining agreement who wishes to avoid federal district court jurisdiction need only allege a "pre-existing" individual contract (App. A-16). *See Federated Dept. Stores v. Moitie*, 452 U.S. 394, 397, n.2 (1981) ("courts will not permit [a] plaintiff to use artful pleading to close off defendant's right to a federal forum . . . ."). Supreme Court review is warranted to resolve these important federal questions and reconcile the conflict between the decision below and the applicable decisions of this Court and numerous other Courts of Appeals. Rule 17.1(a), (c), Rules of the Supreme Court of the United States.

II. The Court of Appeals' Decision Conflicts With Supreme Court Decisions Showing That Removal Was Proper Because the California State Claims Necessarily Depend on Resolution of a Substantial Question of Federal Law

Williams' state claims were also removable as "a suit of which the federal courts will take jurisdiction because it turns on a question of federal law." *Franchise Tax Board*, 463 U.S. at 28. As the Court explained in *Franchise Tax Board*, and as it most recently reaffirmed in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. ____, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986), a case "arises under" federal law where a substantial disputed question of federal law is a necessary element of one of the well pleaded state claims or "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board*, 463 U.S. at 13, 27-28.[7] The

[7] In *Merrell Dow Pharmaceuticals, Inc.*, the Court carved out an exception to this removal standard: "A [complaint alleging a] violation of a federal statute as an element of a state cause of action, *when Congress has determined that there should be no private, federal cause of action for the violation*, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" (Emphasis added.) 92 L. Ed. 2d at 665. Here, Congress has not made any similar express determination with regard to section 301.

decision of the Court of Appeals did not address this removal standard in any significant way (App. A-16). It simply found that the standard was not met, a conclusion plainly in conflict with the principles set forth by this Court in *Franchise Tax Board* and *Merrell Dow Pharmaceuticals*.

Each of Williams' state claims necessarily "turns on a question of federal law." 463 U.S. at 28. The most obvious is his first cause of action, an implied in fact contract claim, that based upon the "actions and conduct" of Caterpillar, Williams "inferred" and "understood" that he would not be terminated from any Caterpillar job, including a future bargaining unit job, "so long as [his] job performance [in that position] was satisfactory" (App. A-48, 49, ¶ 28, 29, 30). *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1373 (9th Cir. 1984); *Marvin v. Marvin*, 18 Cal. 3d 660, 678 n.16, 134 Cal. Rptr. 815, 827 (1976); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927. To resolve this state claim, a court must consider "the *totality* of the parties' relationship." *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d at 329 (emphasis added). The "totality", however, obviously includes the last five years of Williams' employment, a period effectively ignored by the Court of Appeals, but a period of time when a number of critical events occurred, which are directly alleged in Williams' complaint, and which implicate directly and substantially the terms of the collective bargaining agreement and thus section 301.

Williams alleged that during his last five years of employment, (1) he performed satisfactory bargaining unit work, (2) he was wrongfully discharged from his bargaining unit job, and (3) he was wrongfully denied a transfer from his bargaining unit job upon plant closure (App. A-49, 50). He must prove each of these allegations to establish his California contract claim. *See Pugh*, 116 Cal. App. 3d at 329-330, 171 Cal. Rptr. at 927. Yet each is specifically covered by the collective bargaining agreement, which also provides that any dispute concerning these issues must be

resolved by arbitration (App. A-64, 65-73, 74-78).[8] Under *Franchise Tax Board*, therefore, Williams' contract claim obviously turns on "a substantial question of federal law," i.e., the interpretation of various provisions of the collective bargaining agreement. *Franchise Tax Board,* 463 U.S. at 27-28.

During those last five years another significant event occurred which similarly involves substantial federal questions and upon which his state claims will depend: Williams became a member of a union which on his behalf, in 1980, 1983, and on three occasions in 1984, entered into collective bargaining agreements which covered identical issues as the alleged individual agreement covered during the same period of time. Under black letter, federal and California law, those two employment contracts "must be interpreted together" when determining "the totality of the parties' relationship," and to determine to what extent the later contract supplanted the earlier contract. *See* 6 *Corbin On Contracts,* 198, 212-13, §§ 1293, 1296 (1962); *J.I. Case v. NLRB; White v. Soto,* 82 Cal. 654, 657, 23 P. 210, 211 (1890); Cal. Civ. Code §§ 1641, 1642; *Grunwald-Marx, Inc. v. Los Angeles Joint Board,* 192 Cal. App. 2d 268, 277, 13 Cal. Rptr. 446, 452 (1961); *Div. of Labor L. Enforcement v. Safeway Stores,* 96 Cal. App. 2d 481, 485, 215 P.2d 773, 777 (1950); *Crossen v. Foremost-McKesson, Inc.,* 537 F. Supp. 1076, 1077 (N.D. Cal. 1982). These determinations will necessarily involve reference to, and the interpretation of, the collective bargaining agreement, i.e., "a substantial question of federal law." *Bale v. General Telephone Co. of California,* 795 F.2d at 780.

Williams' other claims similarly turn on the collective bargaining agreement. The implied covenant of good faith claim is based upon an implied provision contained in Williams' implied in fact contract. Consistent with its interpretation of the implied contract

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[8] The Court of Appeals' statement that Williams' claim is "entirely unrelated to the bargaining agreement" is thus patently incorrect (App. A-17 n.6). It is also incorrect because his complaint alleges a promise specifically pertaining to future bargaining unit work: that when he is downgraded due to an economic downturn, he will be transferred and not discharged in the event of plant closure (App. A-43,¶ D).

claim, a court will be required to determine the extent of conflict between the independent implied covenant and the express and implied terms of the collective bargaining agreement in effect during the very same period of time. *Lueck,* 471 U.S. at 215. ("The assumption that the labor contract creates no implied rights is not one that state law may make.") *See Crossen v. Foremost-McKesson, Inc.,* 537 F. Supp. at 1077. ("[Under California law] [t]here cannot be a valid, express contract, and an implied contract each embracing the same subject but requiring different results.").

The intentional infliction and fraud claims raise the same federal questions; i.e., Williams must prove that his bargaining unit work was satisfactory, that his discharge from the bargaining unit was improper, and that upon plant closure, he should have been transferred from the bargaining unit. *See, e.g., Olguin,* 740 F.2d at 1475-76 (removal is proper where the claim of emotional distress "arose out of the employee's discharge" and where "the acts alleged in [the] emotional distress complaint were . . . disputes concerning employment or work conditions"); *Buscemi v. McDonnell Douglas Corp.,* 736 F.2d 1348, 1351-52 (9th Cir. 1984); *Beers v. Southern Pacific Transportation Co.,* 703 F.2d 425 (9th Cir. 1983). In *Bale v. General Telephone Co. of California,* 795 F.2d at 780, in a similar context, a different panel of the Ninth Circuit explained:

> In order to prove their fraud . . . claims, [plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

III. The Court of Appeals' Decision Is In Direct Conflict With An Existing Opinion of Another Court of Appeals

The Ninth Circuit decision is in direct conflict with the Fifth Circuit decision in *Eitmann v. New Orleans Public Service, Inc.,*

730 F.2d 359, on both the removal and section 301 questions.[9] Like Williams, the plaintiff in *Eitmann* contended that he entered into an individual employment contract *before* he became a member of the bargaining unit ("prior to being hired"), and that his individual contract was entirely unrelated to the bargaining agreement and outside the scope of the bargaining unit. 730 F.2d at 360, 362-63. Like Williams, the plaintiff in *Eitmann* contended that his pre-existing independent contract "provided, essentially, for lifetime employment, regardless of" the terms of a collective bargaining agreement which was in effect during the very same period of time. 730 F.2d at 362-63. Like Caterpillar, the employer in *Eitmann* argued that the plaintiff's claim was preempted by section 301 and thus removable because under federal labor law principles, the pre-existing independent contract became part and parcel of the collective bargaining agreement on issues of conflict: "[The defendant] contends that Eitmann's claim is necessarily subsumed into the collective bargaining agreement." 730 F.2d at 362.

The Fifth Circuit agreed with the defendant's analysis. The Court held that in the light of the preemptive force of section 301, removal jurisdiction existed under the "artful pleading" doctrine, and that plaintiff could not avoid federal jurisdiction by failing to mention the collective barganing agreement into which his pre-existing independent contract was later subsumed. 730 F.2d at 366. The material facts of the instant case are no different.

Significantly, two different panels from the Ninth Circuit have held that an alleged *co-existing* independent contract, based either upon a written policy manual or any other theory, cannot be used to defeat removal where the plaintiff is covered by a collective bargaining agreement and claims wrongful discharge. *Bale v. General Telephone Co. of California*, 795 F.2d at 779; *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d at 1474. *Bale* and *Olguin* are consistent with a number of other federal courts which have concluded that pre-existing independent contracts, to

[9] The Court of Appeals refused to either cite or discuss *Eitmann*, even though Caterpillar cited *Eitmann* to the Court in its Brief of Appellees, and discussed the conflict in its two Petitions for Rehearing.

the extent of conflict, are supplanted by later collective bargaining agreements where, as here, the plaintiff contends that the pre-existing contract was in effect during the same time period as the collective bargaining agreement. *See, e.g., J.I. Case v. NLRB*, 321 U.S. at 337, 339; *Malia v. RCA Corp.*, 794 F.2d at 913; *Eitmann v. New Orleans Public Service, Inc.*; *Manning v. Bouton*, 678 F.2d at 13; *Lewellyn v. Fleming*, 154 F.2d at 213.

The Court of Appeals attempted to distinguish *Olguin* by noting that unlike Williams, Olguin was always a member of the bargaining unit, and that he alleged a co-existing independent contract rather than a pre-existing independent contract (App. A-17, n.6). This distinction, however, is technical and meaningless. First, such a distinction was of no import to the courts in *J.I. Case, Malia, Eitmann, Manning*, or *Lewellyn*. Second, even when a plaintiff relies on a pre-existing individual contract, the plaintiff is necessarily contending that once he joined the bargaining unit, the pre-existing individual contract remained in effect throughout the bargaining unit employment, and that during this period of time, on matters of conflict, the pre-existing individual contract controlled the collective agreement. In effect, therefore, the plaintiff is asserting that the pre-existing contract became a co-existing contract during the most relevant time period—throughout the bargaining unit employment and when the alleged wrongful discharge occurred.[10] The state action therefore turns on section 301, permitting removal, because the state claims become dependent upon the terms of the collective bargaining agreement, and thus "necessarily [depend] on resolution of a substantial question of federal law." *Franchise Tax Board*, 463 U.S. at 13, 27-28.

Unless this conflict is resolved, numerous wrongful discharge lawsuits will be filed in state courts by employees covered by

[10] During the "co-existing" period of time—in this case, five years—federal labor law prohibited Caterpillar from negotiating with Williams individually. 29 U.S.C. § 159(a). Therefore, Caterpillar's collective bargaining agreements with the Union, covering the issues of plant closure and termination, obviously affected any alleged individual contract dealing with the same subjects.

collective bargaining agreements, lawsuits which will not be removable despite the substantial section 301 questions involved. For example, under the Court of Appeals' holding, the following claims would no longer be removable: contract and tort claims by individuals covered by collective bargaining agreements who contend that they entered into pre-existing independent contracts based upon alleged promises made by their employers during pre-employment interviews,[11] in newspaper or media advertisements, during union organizational drives and representation elections,[12] or at any time prior to the time the individuals joined the union or a union entered into a formal collective bargaining agreement with their employer,[13] to wit, before the employer and the union executed the collective bargaining agreement,[14] before the union was certified to represent the employees in the bargaining unit, or whenever the individuals worked outside bargaining unit positions. Many thousands of employees presently covered by collective bargaining agreements may now assert such "state-law" claims and, based on the Court of Appeals' decision, avoid federal district court jurisdiction.

IV. The Court of Appeals' Decision Creates Undue Interference With The Federal Regulatory Scheme

Because of the Court of Appeals' artificial distinction between co-existing and pre-existing individual contracts, state courts will now address questions concerning the scope of a union's authority to negotiate non-unit rights or pre-existing promises (*Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1952) (non-unit employment is a proper subject for collective bargaining agreements); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) ("[t]hus only the Union may contract the employee's terms and conditions of employment . . . the Union may even bargain away his right[s] . . .)). State courts and juries will also determine the

[11] *Eitmann*, 730 F.2d at 362.

[12] *J.I. Case v. NLRB*.

[13] *Manning*, 678 F.2d at 15; *Lewellyn*, 154 F.2d at 213.

[14] *Roberts v. Automobile Club of Michigan*, 138 Mich. App. 488, 360 N.W.2d 224 (1984), certiorari pending (Case No. 85-1731).

intent of Caterpillar and the Union when they agreed to the discharge, plant closure, transfer, and dispute resolution provisions of the instant collective bargaining agreements. *Lueck*, 471 U.S. at 210-211. The state courts will thus decide recurring and controlling questions of federal labor law and thereby jeopardize the "uniform law" of section 301 which this Court has heretofore so jealously guarded. *Lueck*, 471 U.S. at 210-211; *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962).

To be sure, state courts have concurrent jurisdiction over section 301 actions. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). However, concurrent jurisdiction means that defendants have the *option* of removing section 301 actions to the federal district courts if they so choose. 28 U.S.C. § 1441. As explained in *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968) "[r]emoval is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law.' " 390 U.S. at 560. The Court of Appeals' decision, however, takes that option away from these defendants, and from any other defendant who is a party to a collective bargaining agreement, whenever a bargaining unit employee alleges a pre-existing individual state law contract.

Employers and unions covered by collective bargaining agreements, or subject to the duty to bargain in good faith, can neither administer their agreements nor engage in bargaining effectively unless questions concerning the interpretation of collective bargaining agreements, and the scope of the union's authority to bind its members, are resolved by application of a uniform federal common law. Consistent with the federal scheme, these questions are most effectively developed and applied by federal district courts familiar with the policies underlying section 301, not 50 distinct jurisdictions. By prohibiting removal, review of these questions will not be available to employers or other defendants in the normal course of federal appellate review. 28 U.S.C. §1447(d).

The Court of Appeals' decision also interferes with the federal regulatory scheme because it failed to recognize the relevance of the arbitration remedy agreed to by Williams. In *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. ____, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986), this Court reaffirmed the

importance of arbitration in resolving employee-employer disputes, and the presumption of arbitrability with regard to such disputes:

> [I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

89 L. Ed. 2d at 656.

This principle was ignored by the Court of Appeals. The court begged the question of arbitrability by focusing on the alleged "entirely separate and independent agreement," which did not contain an arbitration clause (App. A-15). The arbitration clause in this case, however, was no less "broad" than the one discussed in *AT&T Technologies* (App. A-65). It required arbitration of "[a]ny matter involving . . . working conditions covered by the [a]greement . . . or [a]ny matter involving the application or interpretation of any provisions of this [a]greement." Surely, Williams' contentions that his bargaining unit work was satisfactory, that he was wrongfully discharged from his bargaining unit job, and that the company wrongfully refused to transfer him from his bargaining unit job were, at the very least, arguably matters "involving . . . working conditions covered by the [a]greement." Similarly, his contention that his individual contract was independent of his co-existing collective bargaining agreement was a matter "involving the application or interpretation of . . . this [a]greement."

These are issues for an arbitrator or a federal district court to decide in the first instance. The federal regulatory scheme requires no less. To refer such federal questions to the state courts, and to ignore the presumption of arbitrability, clearly "depart[s] from the accepted and usual course of [removal and section 301] proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court of the United States.

Pending before this Court is *General Motors Corp. and Metropolitan Life Insurance Co. v. Taylor* (Case Nos. 85-686, 85-688, Court of Appeals decision 763 F.2d 216), an ERISA case, where the Court granted certiorari to address questions concerning a defendant's right to remove state court actions within the scope of a federal statute, and the importance of maintaining the federal regulatory scheme intended by Congress. In the instant proceeding, the questions concerning removability and the scope of the federal statute are almost identical to those presented in *General Motors Corp.* These questions are no less important when they are raised in proceedings implicating section 301. Certiorari is equally appropriate here.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: September 30, 1986.

Respectfully submitted,
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation

By: GARY P. SCHOLICK
Attorneys for Petitioners
Caterpillar Inc., Robert Gilmore, Don Fowler, Jeffrey Glickman, A. E. Mathisen, and Keith Wheeler

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 85-1972
D.C. No. C-85-1346-CAL

Cecil Williams, Clyde Ward,
Frederick Walker, Robert A. Van Buren,
Clark A. Torres, John Tennant,
James Payton, James A. Morretti,
Andrew Horvath, Richard L. Gonzales,
Willie Crum, Pete Carnute, and Joel Bryan,
Plaintiffs/Appellants,

vs.

Caterpillar Tractor Company,
Robert E. Gilmore, Don Fowler,
Jeffrey A. Glickman, A.E. Mathisen,
Keith Wheeler, and Does I through XX, inclusive,
Defendants/Appellees.

ORDER
[Filed June 12, 1986]

Before: BROWNING, Chief Judge, and TANG and BEEZER, Circuit Judges

The opinion in this case, filed April 7, 1986, is amended in accordance with the attached Amended Opinion.

For Publication
United States Court of Appeals
For the Ninth Circuit

C.A. No. 85-1972
D.C. No. C-85-1346-CAL

Cecil Williams, Clyde Ward,
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AMENDED OPINION
[Filed June 12, 1986]

On Appeal From the United States District Court
For the Northern District of California
Hon. Charles A. Legge, District Judge, Presiding
Argued and Submitted February 14, 1986
San Francisco, California

Decided April 7, 1986
Amended June 12, 1986

Before: BROWNING, Chief Judge, and TANG and
BEEZER, Circuit Judges

BEEZER, Circuit Judge:

Plaintiffs, former employees of the Caterpillar Tractor Company, appeal the dismissal of their damage action for breach of employment contracts. We reverse on the ground that the action was improperly removed from state court and hold that the district court lacked jurisdiction to address the merits of the preemption defense or to dismiss the action.

I
BACKGROUND

The plaintiffs were all employed by defendant, Caterpillar Tractor Company, at its facility in San Leandro, California. They were initially employed in positions covered by a collective bargaining agreement, but were eventually elevated to positions as management or weekly salaried employees outside the scope of the collective bargaining unit.

During the period of time in which the plaintiffs were employed in positions outside of the bargaining unit, Caterpillar officials allegedly promised the plaintiffs permanent employment with Caterpillar as long as their performance was satisfactory. They were allegedly told that, even if the San Leandro plant were closed, they would be given the opportunity to transfer to positions at other Caterpillar facilities or with related companies or subsidiaries of Caterpillar. The plaintiffs claim they relied upon these promises in remaining in Caterpillar's employment.

Subsequently, all of the plaintiffs were downgraded in position and returned to bargaining unit jobs. They were then discharged shortly after the San Leandro facility closed in 1983.

The plaintiffs filed an action in California state court against Caterpillar and various Caterpillar officials alleging breach of an employment contract, breach of a covenant of good faith and fair dealing, intentional infliction of emotional distress, and fraudulent misrepresentation, all causes of action under state law. Caterpillar removed the action to federal district court on the ground that the state claims were preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that the action must be recharacterized as an action arising under § 301. Caterpillar contended that the alleged agreements which were made with the plaintiffs while they were not members of the bargaining unit were merged into and superseded by the collective bargaining agreement when the plaintiffs were subsequently downgraded to bargaining unit positions.

The district court denied the plaintiffs' motion under 28 U.S.C. § 1447(c) to remand the action to state court, with the exception of the claims of one plaintiff who had not been employed in a

position covered by the collective bargaining agreement at the time of his discharge.

The district court ruled that the complaint stated a federal labor law claim cognizable under § 301, on the ground that the complaint involved a dispute over employment agreements including both personal employment contracts and the collective bargaining agreement. The district court's oral opinion, although not unambiguous, indicates the ruling hinged on the fact the plaintiffs were in positions covered by the collective bargaining agreement at the time of the plant closure.

The district court then dismissed the action, with leave to amend the complaint, on the ground that the plaintiffs had failed to exhaust the mandatory grievance-arbitration procedures provided in the collective bargaining agreement. The plaintiffs elected not to amend their complaint, and timely filed this appeal.

II
STANDARD OF REVIEW

Removal of a case from state to federal court is a question of federal subject matter jurisdiction which is reviewable *de novo*. *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir. 1986). The burden of establishing federal jurisdiction falls on the party invoking the removal statute. *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984), *cert. denied*, 106 S.Ct. 180 (1985).

III
REMOVAL JURISDICTION BASED ON PREEMPTION

A suit may be removed to federal district court under 28 U.S.C. § 1441(a) only if it could have been brought there originally. *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 666 (9th Cir. 1985). Federal district courts are granted original jurisdiction under 28 U.S.C. § 1331 over all civil actions "arising under the Constitution, laws, or treaties of the United States."

An action "arises under" federal law only if "resolution of the federal question must play a significant role in the proceedings."

Hunter, 746 F.2d at 646. Under the "well-pleaded complaint" rule, the federal question must appear from the complaint and not from any defense the defendant might raise to defeat the cause of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983); *Bright*, 780 F.2d at 769; *see generally* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3566 (1984).

On the face of the complaint, the employees have alleged state law causes of action. However, Caterpillar contends the action actually implicates section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), which governs actions for violations of collective bargaining agreements.

It is axiomatic that the plaintiff is generally considered the "master" of his complaint. *Franchise Tax Board*, 463 U.S. at 22; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon") (Holmes, J.). As such, the employees would be entitled to allege a state law cause of action, rather than a federal cause of action, and seek relief in a state forum. However, the "artful pleading" doctrine constitutes an exception to that general principle. This doctrine provides that the federal courts may take jurisdiction over a complaint removed from state court where the plaintiff, although framing his action under state law, in actuality raises an essential federal law question.[1] *Bright*, 780 F.2d at 769; *see generally Hunter*, 746 F.2d at 640-44.

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[1] The "artful pleading" doctrine permits federal courts to investigate the true nature of the plaintiff's affirmative allegations, often looking to "the petition for removal to clarify the action presented in the complaint in determining whether it raises a federal question." *Bright*, 780 F.2d at 769 n.3; *see also Olquin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1473 (9th Cir. 1984). For example, in *Olquin*, the plaintiff's complaint, although framed as a state law tort and contract action, was found actually to be grounded upon a collective bargaining agreement covering discharge from employment. We held that removal was proper as the plaintiff's action was "in fact a section 301 suit on the bargaining agreement." *Id.* at 1474-75.

The "artful pleading" doctrine is a narrow exception to the ordinary rules of federal jurisdiction, applying only when "the particular conduct

The "artful pleading" doctrine may come into play in two related contexts. First, when the plaintiff alleges a state law claim that is preempted by federal law and a federal remedy exists for the plaintiff's grievance. *Hunter,* 746 F.2d 642-43. Second, when the plaintiff's state law claim necessarily implicates a federal law question, other than as a defense. *Bright,* 780 F.2d at 769; *see also Franchise Tax Board,* 463 U.S. at 9, 22.

This case requires us to consider the propriety of "preemption removal" as applied to the Caterpillar employees' complaint. The federal courts have long struggled with the question of whether, and under what circumstances, removal can be based upon a defendant's allegation of federal preemption. *See generally* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule,* 51 U. Chi. L. Rev. 634 (1984). Recently, the Supreme Court directly addressed this problem in *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983).

In *Franchise Tax Board,* the Supreme Court held that the federal courts had no jurisdiction to decide whether state tax authorities were preempted from executing a levy for unpaid taxes on a benefit plan fund covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. *Id.* 3-4. The levy action had been removed from state to federal district court on the ground the state cause of action was preempted because it interfered with an ERISA protected plan. *Id.* at 7. Since the Supreme Court held that there was no independent basis for removal jurisdiction, it expressly declined to reach the merits of the preemption defense. *Id.* at 7.

The Court's decision affirmed the long-standing rule in this circuit that the question of federal preemption is ordinarily relevant only as a potential defense to an obligation created by state law. *See id.* at 13-14; *see also Guinasso v. Pacific First*

complained of [is] governed exclusively by federal law." *Hunter,* 746 F.2d at 640. This "doctrine is to be invoked only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results." *Salveson v. Western States Bankcard Association,* 731 F.2d 1423, 1427 (9th Cir. 1984).

Federal Saving & Loan Ass'n, 656 F.2d 1364, 1366 (9th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982); *Hunter,* 746 F.2d at 641. In such a case, federal jurisdiction does not lie, and the action must be remanded to state court for consideration of the federal preemption defense. *See Franchise Tax Board,* 463 U.S. at 3-4, 12.

However, "if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Id.* at 24. The Court expressly stated that the "preemptive force of § 301 [of the LMRA] is so powerful as to displace entirely any state cause of action" for violation of a collective bargaining agreement. *Id.* at 23. In such a case, the action may be removed to federal court even if an otherwise adequate state cause of action may exist. *Id.* at 24.

The distinction thus established is between preemption as a defense, allegedly precluding the plaintiff's state law cause of action, as opposed to "complete preemption" which means that the plaintiff's cause of action is necessarily a federal one. *See* Comment, *supra,* 51 U. Chi. L. Rev. at 652. Where there is "complete preemption," the court determines that Congress' intent was to preempt an entire field of law and provide a uniform federal law cause of action. *See id.* at 660 n.122. The "necessary jurisdictional consequence is that the cause of action is made federal, permitting removal." *Id.*

A state law cause of action has been "completely preempted" when federal law both displaces *and* supplants the state law—that is, when federal law provides both a superseding remedy replacing the state law cause of action *and* preempts that state law cause of action.[2] *See generally Hunter,* 746 F.2d at 642-43; Note, *Removal*

[2] One commentator, analyzing the state of "preemption removal" law after *Franchise Tax Board,* persuasively argues that the existence of a superseding federal remedy is not necessary for removal of a preempted state law cause of action. Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule,* 51 U. Chi. L. Rev. 634, 662-67 (1984). Rather, he contends that the crucial inquiry is whether the federal law preempts an entire field of regulation, as

opposed to merely preempting a particular state law because it conflicts with the federal law's operation under the circumstances of the case.

Where "field" preemption, as opposed to "conflict" preemption, exists, it is an indication of congressional intent that an area of law be exclusively federal in nature. *Id.* at 664-65. Consequently, he concludes, the stronger nature of the federal interest involved in "field" preemption justifies exercise of federal jurisdiction in such circumstances, regardless of whether the preempting federal law also supplies a remedy for the plaintiff's grievance. *Id.* at 666. Of course, the existence of a superseding federal cause of action is relevant as clear evidence that the state law cause of action is within a preempted field of law. *Id.*

Although this argument is persuasive, and not directly contradicted by the Supreme Court's decision in *Franchise Tax Board,* we decline to follow it. It has long been the law in this circuit that removal jurisdiction lies only when federal law supplants, as well as displaces, state law. The existence of a substitute federal remedy, in addition to preemption, is required by our precedent. *See generally Hunter,* 746 F.2d at 642-43.

Furthermore, this requirement is consistent both with federal jurisdictional statutes and with *Franchise Tax Board.*

If federal law displaces state law, but does not supplant it with an analogous federal remedy, then the complaint simply does not "arise under" federal law as required by 29 U.S.C. § 1331. Preemption, in such a case, is a purely defensive allegation. But if federal law does provide a remedy, and the state law cause of action is also preempted, the complaint is susceptible to recharacterization as a federal cause of action permitting federal jurisdiction.

In addition, the Supreme Court in *Franchise Tax Board,* described the "complete preemption" doctrine as applying where a federal cause of action "completely preempts" the state law *and* the complaint "comes within the scope of the federal cause of action." 463 U.S. at 24. This requirement that the complaint come "within the scope" of the federal cause of action is a strong indication that the federal cause of action must provide a substitute remedy to the plaintiff replacing his state law cause of action before removal can be proper.

Moreover, the Court found federal jurisdiction lacking in *Franchise Tax Board* because federal law in that case did "not provide an alternative cause of action in favor of the State to enforce its rights,

ers Vacation Trust, 70 Cornell L. Rev. 557, 577-78 (1985). These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court.

First, as an initial matter, a federal court must determine whether "it is apparent from a review of the complaint that federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered." *See Hunter,* 746 F.2d at 643. If no federal right is violated by the acts the plaintiffs allege occurred, then no federal question is raised in the complaint and the federal courts are without jurisdiction. The preemption argument then focuses only on the proposition that the state cannot regulate the field, which is a defensive allegation. *Id.* at 642 (quoting *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367, 1371 n.5 (9th Cir. 1984), *certi. denied,* 105 S.Ct. 2319 (1985)). Consequently, such an action must be remanded to state court.

The Supreme Court's decision in *Franchise Tax Board* makes clear that the actual merits of the defendant's preemption allegation are not to be considered at all if a cognizable federal cause of action is not stated in the complaint. *See also Franchise Tax Board v. Construction Laborers Vacation Trust,* 679 F.2d 1307, 1309-10 (9th Cir. 1982) (Tang, J., dissenting) (under the well-pleaded complaint rule, district court had no jurisdiction to address merits of ERISA preemption defense), *rev'd,* 463 U.S. 1 (1983).

If, and only if, federal law provides an analogous substitute cause of action to the plaintiff, then a federal court must proceed to determine whether the state law cause of action is preempted. If the state law cause of action *is* preempted, the claim must be recharacterized under the federal cause of action and the district court has proper jurisdiction over it. The complaint thus is regarded as having been "artfully pleaded" to avoid a necessary federal question.

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while § 301 [of the LMRA] expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its preempted state contract claim." *Id.* at 26. *See generally* Note, *Removal Doctrine Reaffirmed:* Franchise Tax Board v. Construction Laborers Vacation Trust, 70 Cornell L. Rev. 557, 569-70, 577-78 (1985).

On the other hand, if the state law cause of action is *not* preempted, then the action must be remanded to state court. Even though a federal cause of action could have been raised, the plaintiff remains the "master" of his complaint and " 'is free to ignore the federal question and pitch his claim on the state ground.' " *Salveson v. Western States Bankcard Ass'n,* 731 F.2d 1423, 1427 (9th Cir. 1984) (quoting 1A Moore's Federal Practice ¶ 0.160, at 185 (2d ed. 1979)). The plaintiff is entitled to pursue his state law cause of action in state court, despite the availability of a federal cause of action, with the *caveat* that failure to raise a parallel federal cause of action may result in its preclusion by the doctrine of res judicata in any future proceeding. *See Hunter,* 746 F.2d at 640-41.

IV
RECONCILING PREVIOUS PRECEDENT

It is not clear that the approach outlined in this opinion, requiring ascertainment of a superseding federal cause of action as a jurisdictional prerequisite to addressing the merits of the preemption allegation, has been consistently followed in this circuit, although no decision has held to the contrary.

Two decisions in this circuit, filed subsequent to the Supreme Court's analysis of the "removal preemption" problem in *Franchise Tax Board,* failed to expressly determine the existence of a federal remedy as a prerequisite to the consideration of the preemption issue.

In *Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367, 1371-73, 1376 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 2319 (1985), this court held that the plaintiff's state law cause of action for wrongful discharge in violation of public policy was not preempted by § 301 of the LMRA. The plaintiff alleged he was discharged in retaliation for reporting the employer to the health department for delivering adulterated milk. The employer removed the action to federal district court, claiming it was preempted by § 301.

The *Garibaldi* court expressly stated that removal depended, not on preemption, but on whether a federal claim was stated in

the complaint. *Id.* at 1370. It was also recognized that where the federal question is not raised affirmatively in the complaint, the final resolution of a preemption defense is for the state court on remand. *Id.* at 1369 n.4. However, the opinion then proceeded to address only the preemption argument. *Id.* at 1371-76. In addressing the preemption issue, the *Garibaldi* decision cited for authority *Guinasso v. Pacific First Federal Savings & Loan Association,* 656 F.2d 1364 (9th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982), although in *Guinasso,* we expressly declined to consider the preemption argument once we ascertained the absence of a federal remedy, *id.* at 1367.

In *Aragon v. Federated Department Stores, Inc.,* 750 F.2d 1447 (9th Cir. 1985), *cert. denied,* 106 S.Ct. 229 (1985) & 54 U.S.L.W. 3454 (U.S. Jan. 13, 1986) (No. 85-386), this court held that a state law cause of action for malpractice against a union attorney in handling an employee grievance under the collective bargaining agreement was not preempted by "federal labor law," without clarifying whether the issue of preemption was being considered under § 301 or rather under the National Labor Relations Act. This action had also been removed from state court. As in *Garibaldi,* the opinion proceeded to address the preemption argument without first stating that a federal claim existed to provide jurisdiction to address the merits of the preemption claim.

However, it is important to note that neither *Aragon* nor *Garibaldi* cited *Franchise Tax Board* or commented on the Supreme Court's requirement that initial removal jurisdiction be proven before addressing the merits of the preemption allegation. Neither decision expressly considered whether the preemption issue was properly before the court.[3]

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[3] Perhaps even more significantly, both decisions analyzed the preemption claims through references to preemption law under the National Labor Relations Act (NLRA). The NLRA may constitute a fairly unique area of law where, at least in some cases, the determination of federal jurisdiction in the National Labor Relations Board (NLRB) employs the identical analysis required to determine whether a state law claim is preempted. *See Sears, Roebuck & Co. v. San Diego Council of*

Most importantly, in several recent decisions, we *have* followed the proper approach to "preemption removal" cases, although perhaps without always consciously doing so. In these decisions, all involving possible preemption under § 301, we, although often loosely mentioning "preemption" in the same breath, have carefully focused the initial inquiry on whether a federal cause of action was stated under § 301. *See, e.g., Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1350-51 (9th Cir. 1986) (opinion notes that plaintiffs conceded removal was proper under § 301 because state law claims were in part a contract theory implicating the collective bargaining agreement, before addressing preemption issue); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 667 (9th Cir. 1985); *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341, 1343-46 (9th Cir. 1984) (case also involved ERISA preemption issue, which we expressly declined to address due to lack of jurisdiction); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1474-75 (9th Cir. 1984); *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348, 1350-51 (9th Cir. 1984) (case also involved NLRA preemption). *See also Clorox Co. v. United States District Court*, 779 F.2d 517, 521 (9th Cir. 1985) (we clearly held ERISA created federal cause of action before finding preemption of state claims).

The most important recent case, in this respect, is *Hunter v. United Van Lines*, 746 F.2d 635 (9th Cir. 1984), *cert. denied*, 106

Carpenters, 436 U.S. 180, 197 (1978). If the activity underlying a state law claim is "arguably subject" to regulation under sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157, 158, the action is both preempted and falls within the exclusive jurisdiction of the NLRB. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *Labor Production Industrial Workers Local No. 1054 v. West Coast Industrial Relations Association, Inc.*, 775 F.2d 1042, 1047-49 (9th Cir. 1985); *see generally* Schultz & Husband, *Federal Preemption Under the NLRA: A Rule in Search of a Reason*, 62 Denver U. L. Rev. 531 (1985). A federal court may be able to take jurisdiction over a case removed from state court for the limited purpose of determining whether exclusive federal jurisdiction exists in the NLRB. Thus, the preemption analysis applied under the NLRB should be distinguished from the approach taken with regard to § 301 of the Labor Management Relations Act, although the provisions may overlap on occasion.

S.Ct. 180 (1985), where we gave the most express indication to date of agreement with the general approach outlined in this opinion. In that decision, we held there was no basis for removal jurisdiction in the federal district court as the federal claim alleged did not reach the jurisdictional amount and the state law claim did not "hinge on" federal law. We expressly concluded that the district court should have remanded the entire case to the state court without considering the preemption issue. *Id.* at 638, 652; *see also id.* at 653 (Sneed, J., concurring).

In conclusion, as the propriety of the order of decision was not explicitly decided in *Garibaldi* and *Aragon*, and as *Franchise Tax Board* and *Hunter* reached a contrary result, we are not bound by any implication, if it exists, that the preemption issue may be decided before the jurisdictional federal cause of action issue. *See Guinasso*, 656 F.2d at 1366.

V
JURISDICTION UNDER § 301

To avoid prematurely addressing the merits of the preemption issue, the scope of § 301 as applied to the Caterpillar employees' complaint must first be determined. The question is whether the grievance they complain of, denial of the promised permanent right of employment during satisfactory performance, constitutes a violation of a right protected by § 301.

Section 301 of the Labor Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185(a).

An action within the scope of § 301 is governed by federal substantive laws, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957), and is subject to removal to federal court under 28 U.S.C. §1441, *Avco Corp. v. Aero Lodge No. 735*,

International Association of Machinists, 390 U.S. 557, 560-62 (1968). Section 301 is to be given broad interpretation. *Smith v. Evening News Association,* 371 U.S. 195, 199 (1962).

In *Painting and Decorating Contractors Association v. Painters and Decorators Joint Committee,* 707 F.2d 1067 (9th Cir. 1983), *cert. denied,* 466 U.S. 927 (1984), we described the scope of § 301:

> All that is required for jurisdiction to be proper under § 301(a) is that the suit be based on an alleged breach of contract between an employer and a labor organization *and* that the resolution of the lawsuit be focused upon and governed by the terms of the contract.

Id. at 1071 (emphasis added).

The complaint brought by the Caterpillar employees meets neither of these requirements, both of which must be satisfied for jurisdiction to be based upon § 301.

As to the first requirement, the employees' complaint is not based upon any alleged breach of the collective bargaining agreement between the union and Caterpillar. Rather the contract breach alleged involves the violation of entirely separate and independent contracts made outside of the collective bargaining process. The alleged promises of permanent employment were made when the employees were in management positions and were not even members of the bargaining unit.

For jurisdiction to lie under § 301, "the rights and liabilities of the parties . . . must be a product of the bargaining agreement itself, and not of some other origin." *Lumber Production Industrial Workers Local No. 1054 v. West Coast Industrial Relations Association, Inc.,* 775 F.2d 1042, 1046 (9th Cir. 1985). The Caterpillar employees' cause of action arises out of independent contracts, most assuredly not from the collective bargaining agreement. Caterpillar cannot truly contend that the bargaining agreement offered any guarantee of permanent employment, or

that the plaintiffs' claims actually "arise under" the bargaining agreement.[4]

As to the second requirement for jurisdiction based upon § 301, resolution of the employees' state law cause of action is not focused upon interpretation of the collective bargaining agreement. Their claims are not "derived" in any way from the agreement. *Compare Allis-Chalmers Corp. v. Lueck,* 105 S. Ct. 1904, 1914 (1985) (state law tort duty of good faith "derived" from implied covenant found in collective bargaining agreement). Even if some reference to the collective bargaining agreement is required, that alone is not sufficient to transform a case into one that "arises under" § 301.[5] *Carpenters Southern California Ad-*

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[4] Caterpillar attempts to pull the plaintiffs' action within the scope of § 301 by contending the plaintiffs' grievances were subject to the arbitration clause in the Caterpillar collective bargaining agreement.

However, this case involves entirely separate and independent agreements which are not within the scope of the collective bargaining agreement. Furthermore, the arbitration clause in the bargaining agreement expressly limits the duty to arbitrate to matters "covered by the Agreement" or involving the application or interpretation "of any provisions of this Agreement." Consequently, the bargaining agreement arbitration clause, by its own terms, is limited to disputes arising under the agreement, and does *not* cover matters collateral to the agreement, such as independent individual contracts. *See Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80,* 605 F.2d 1290, 1296 (2d Cir. 1979).

[5] Caterpillar relies on *Allis-Chalmers Corp. v. Lueck,* 105 S. Ct. 1904 (1985) for the proposition that a state law cause of action *ipso facto* must be recharacterized as a federal § 301 action subject to removal whenever reference to a collective bargaining agreement may prove necessary to adjudicate the merits of the case. Apparently Caterpillar contends this is so even if reference to the bargaining agreement will occur only through evaluation of a defensive allegation.

The *Lueck* decision simply cannot be read to support this contention. The *Lueck* case did not even involve the issue of federal removal jurisdiction, but rather was a direct appeal from a state court concerning only a preemption defense based on § 301. It may well be that the particular complaint filed in the *Lueck* case could have been removed to federal court, as the state claim was "inextricably intertwined with

ministrative Corp. v. Majestic Housing, 743 F.2d 1341, 1345 (9th Cir. 1984). Here not even a reference to the collective bargaining agreement is necessary, other than to ascertain that no provision of the agreement can even arguably be construed to provide a remedy for their complaint.

Caterpillar does contend that the collective bargaining agreement must be referred to in determining whether the independent contracts to provide permanent employment are inconsistent with, and thus are superseded by and merged into, the bargaining agreement. The gravamen of Caterpillar's argument is that, through the preemptive force of § 301, the bargaining agreement supersedes and extinguishes all previous obligations of the employer to his employees, including independent and pre-existing contracts.

This is not an argument that the employees' complaint can be recharacterized as a cause of action under § 301. Although we do not comment on the validity of this argument, it remains a defensive allegation that § 301, by merging pre-existing individual contracts into the bargaining agreement, preempts the state law cause of action. This preemption allegation is raised to defeat the plaintiffs' claims grounded in those independent contracts; it is not a necessary element of their affirmative cause of action.[6]

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consideration of the terms of the labor contract." *Id.* at 1912. The fact is that the defendants made no attempt to remove it. Had they made such an attempt, the federal court would have had to pursue the distinct inquiry as to whether an analogous federal remedy replacing the state law action existed to support federal jurisdiction. As that issue was not before the Supreme Court, the *Lueck* decision was necessarily silent on that point.

[6] Our decision in *Olguin v. Inspiration Consolidated Copper Co.,* 740 F.2d 1468 (9th Cir. 1984) is not to the contrary. In that case, the employer removed Olguin's cause of action alleging breach of an employment contract based on a written personnel policy manual. *Id.* at 1474. We held that the collective bargaining agreement preempted any inconsistent provision in the manual. *Id.* We further held that Olguin's "suit was effectively a suit to enforce the collective bargaining agreement." *Id.* Accordingly, we upheld the removal of the action under § 301. *Id.*

Contrary to Caterpillar's contention, application of the "artful pleading" doctrine would not change this conclusion. The "artful pleading" doctrine does not operate to transform a federal defense into a ground for the exercise of federal jurisdiction. It serves only to clarify the true nature of the plaintiff's affirmative claim. *See Bright v. Bechtel Petroleum, Inc.,* 780 F.2d 766, 769 (9th Cir. 1986); *Schroeder v. Trans World Airlines, Inc.,* 702 F.2d 189, 191 (9th Cir. 1983).

In sum, federal law does not create the right the Caterpillar employees allege has been violated.[7] *See Hunter,* 746 F.2d at 643. Section 301 does not provide the plaintiffs any cause of action for

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In contrast with the instant case, Olguin was not alleging an independent employment contract entered into outside of the collective bargaining unit. Olguin had always been a member of the bargaining unit, and had not entered into any pre-existing independent contract with his employer. We found that his breach of contract claim was "in reality" an allegation of a breach of the bargaining agreement. *See id.* at 1470. The Caterpillar plaintiffs raise a claim grounded solely in alleged independent contracts, entered into outside of the bargaining unit and entirely unrelated to the bargaining agreement.

Most importantly, Olguin's wrongful discharge claim fit neatly within the scope of the "just cause" discharge provisions of the collective bargaining agreement. We noted that "the true nature" of his complaint concerned "the terms and conditions of employment as they are set out in the collective bargaining agreement." *Id.* at 1474. Consequently, Olguin's action was easily susceptible to characterization as a § 301 suit. It was apparent that Olguin was simply trying to avoid federal jurisdiction. *See id.* By contrast, the Caterpillar plaintiffs have alleged no claim which could be maintained under § 301.

[7] Caterpillar relies on *Hass v. Darigold Dairy Products Co.,* 751 F.2d 1096 (9th Cir. 1985) for the proposition that the plaintiffs' could have sought a remedy for their grievance through an estoppel argument brought under § 301. This reliance is misplaced.

In *Hass,* the plaintiff had been assured by a union official that she would not lose her seniority standing by switching to part-time employment. When she later discovered her seniority had been lost, she brought an action in state court, which was removed to federal district court as an action arising under § 301. Just prior to trial, the union and the employer entered into a supplemental "understanding" amending seniority rules as applied to workers switching to part-time status.

the injury they allege. Consequently, federal jurisdiction is lacking whether or not the state law cause of action is preempted. *See id.* at 643-44.

VI
CONCLUSION

As the employees' complaint cannot be construed to allege a cause of action remedied by federal law, the district court did not have jurisdiction to consider the preemption defense or to dismiss this action.

In *Franchise Tax Board,* the Supreme Court recognized the incongruity of remanding to state court an action in which "the only question for decision is raised by a federal pre-emption defense." 463 U.S. at 12; *see also Olguin v. Inspiration Consolidated Copper Co.,* 740 F.2d 1468, 1471-72 (9th Cir. 1984).

We held that estoppel principles were applicable in an action arising under federal law. *Id.* at 1099. The union and the employer were estopped from raising the subsequent agreement to defeat the plaintiff's claim to seniority. *Id.* at 1100.

However, the decision in *Hass* does not afford a potential federal remedy to the Caterpillar employees. The *Hass* decision applied estoppel principles to a case already arising under § 301 as it involved interpretation of a collective bargaining agreement. After holding that the subsequent agreement could not defeat the plaintiff's claim, we proceeded to determine whether the original collective bargaining agreement required reinstatement of the plaintiff's original seniority position. *Id.* at 1101. Her "seniority rights were grounded in the . . . bargaining agreement." *Id.* at 1102. Unlike *Hass,* the Caterpillar employees' claims are not "grounded" in a collective bargaining agreement, amended or otherwise.

The Caterpillar plaintiffs may raise estoppel in one of two ways. First, the plaintiffs did raise estoppel in their complaint through a state law cause of action for fraudulent misrepresentation, claiming they detrimentally relied upon the alleged assurances of permanent employment. Second, estoppel may be raised as a shield to defeat Caterpillar's preemption argument that the precedent contracts were merged into the collective bargaining agreement. In neither instance is the estoppel issue raised in the context of a pending § 301 action, as it was in *Hass.* The plaintiffs' claims simply do not arise under § 301.

Nevertheless, such a suit cannot be maintained in federal court because " '[b]y unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.' " *Franchise Tax Board,* 463 U.S. at 12 (quoting *Gully v. First National Bank,* 299 U.S. 109, 116 (1936)). Despite the defendant's real and substantial interest in having the federal preemption argument decided by a federal court, such an interest cannot be the basis for federal jurisdiction under the removal statute. *Hunter,* 746 F.2d at 640.

The district court's judgment is vacated. The action is remanded to the district court with instructions to remand to state court.[8]

VACATED AND REMANDED.

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[8] The Caterpillar employees also allege causes of action for breach of a covenant of good faith and fair dealing, intentional infliction of emotional distress, and fraudulent mispresentations. All of these claims hinge, however, to a substantial degree on their primary claim of a breach of the independent contracts for permanent employment. As we hold that their breach of contract claim based on those independent contracts is not properly removed, we also remand the other related claims in the complaint to the district court with instructions to remand to state court.

Appendix B

United States District Court
Northern District of California

No. C85-1346-CAL

Cecil Williams, Clyde Ward,
Frederick Walker, Robert A. Van Buren,
Clark A. Torres, John Tennant,
James Payton, Clarence Northern,
James A. Morretti, Richard Kanuse,
Andrew Horvath, Lee Green, Richard L. Gonzales,
Willie Crum, Fred Chambers,
Pete Carnute, and Joel Bryan,
Plaintiffs,

vs.

Caterpillar Tractor Company,
Robert E. Gilmore, Don Fowler,
Jeffrey A. Glickman, A.E. Mathisen,
Keith Wheeler, and DOES I through XX, inclusive,
Defendants.

ORDER GRANTING MOTION TO
DISMISS COMPLAINT AND
DENYING MOTION TO REMAND

[Filed April 1, 1985]

This cause came on for hearing on March 15, 1985, on Plaintiff's Motion To Remand Cause To State Court and Defendant Caterpillar Tractor Co.'s Motion To Dismiss on the ground that the state claims set forth in the Complaint were preempted by Section 301 of the Labor-Management Relations Act (29 U.S.C. §185), and that upon recharacterization of the claims as a Section 301 action, the Complaint must be dismissed as to all Plaintiffs except Plaintiff Chambers. The Court having read all papers submitted, having heard oral argument of counsel and being fully advised, it is

ORDERED, that Plaintiff's Motion To Remand is denied and Defendant's Motion To Dismiss the action as to all Plaintiffs except Plaintiff Chambers, be and hereby is granted, and that the Complaint be and it is hereby dismissed, with thirty (30) days leave to amend.

DATED: April 1, 1985.

CHARLES A. LEGGE
United States District Judge

United States District Court
Northern District of California

No. C-85-1346-CAL

Cecil Williams, Clyde Ward,
Frederick Walker, Robert A. Van Buren,
Clark A. Torres, John Tennant,
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James A. Morretti, Richard Kanuse,
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Caterpillar Tractor Company,
Robert E. Gilmore, Don Fowler,
Jeffrey A. Glickman, A.E. Mathisen,
Keith Wheeler, and DOES I through XX, inclusive,
Defendants.

[Filed April 26, 1985]

JUDGMENT

On March 15, 1985, the court denied plaintiffs' motion to remand, and granted defendants' motion to dismiss as to the claims of all plaintiffs except Fred Chambers. Plaintiffs were given 30 days leave to amend. Those rulings were incorporated into the court's order of April 1, 1985. Plaintiffs has subsequently advised the court that they will not amend the complaint.

THEREFORE, judgment is entered in favor of defendants as to the claims of all plaintiffs except plaintiff Fred Chambers. As to plaintiff Fred Chambers, the action is hereby remanded to the Superior Court for the County of Alameda, State of California.

DATED: April 26, 1985.

/s/ Charles A. Legge
CHARLES A. LEGGE
United States District Judge

In the United States District Court
For the Northern District of California

Before the Honorable Charles A. Legge, Judge

No. C-85-1346 CAL

Cecil Williams, et al.,
Plaintiffs,

v.

Caterpillar Tractor Company, et al.,
Defendants.

San Francisco, California
Friday, March 15, 1985

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Friday, March 15, 1985

Morning Session

—000—

The Clerk: Civil 85-1346, Williams v. Caterpillar Company.

Counsel, please state their appearance.

Mr. Scholick: Good morning, Your Honor, Gary Scholick on behalf of defendant Caterpillar.

Mr. Wollett: Fritz Wollett appearing on behalf of plaintiffs Cecil Williams, et al.

The Court: Okay. We are here on plaintiffs' motion to remand and the defendants' motion to dismiss.

I have gone through the papers and am prepared to rule. Anything further that either one of you want to add to what is there?

Mr. Scholick: I have a couple of points I would like to mention, Your Honor.

The Court: Certainly.

Mr. Scholick: Actually, two.

What we have here is plaintiffs claiming a wrongful discharge and the plaintiffs are concededly covered by a collective bargaining contract. There is no question that if they dispute the validity of the discharge, they can seek a remedy with the arbitration provision.

There is no dispute—there is no question that if the defendant Caterpillar resisted their attempt to seek arbitration of their discharge, we would be compelled to arbitrate that discharge. That's what the Del Webb case says. So the only question here—

The Court: Do you think that is applicable in a setting where the plant is being closed and the whole labor force is being discharged?

Mr. Scholick: Surely.

The Court: Do you think those grievance steps apply there as much as they do on an ongoing labor and management setting?

Mr. Scholick: Absolutely. The National Labor Relations Board would require us to follow through on those steps if the employees required us to follow through on those steps. The federal court would compel us to follow through on those steps.

A contract exists—how long did the employees have to sue on—if we refuse to arbitrate, the employees can be in this court within six months and demand us to go through every one of those steps. There is no question but that the federal court would compel us to arbitrate and to follow these steps.

As I see it, Your Honor, the only question is what they are saying is, under the circumstances, are they permitted to ignore the—can they—they have a remedy here and can they ignore it? Can they choose a second remedy?

In my reading of the law, and it is looking back 40 years, there [are] only two circumstances where they can ignore the collective bargaining remedy and seek a state remedy. And in that, you have the Gardner Denver situation where you have Title VII, if there is a breach of statute, they can sue under the contract. If they don't like their remedy there, they have a second bite, you have the statutory violation under Title VII.

The second situation that I have seen in 40 years of labor law is they can, the Garibaldi situation. There is a breach of the state public policy because there is a breach of a state [statute]. I believe it was the California Agricultural statutes. And under those circumstances, the Ninth Circuit [concluded], and right now [certiorari] is pending on that point, that public policy is so strong that they in that situation [can] take two bites out of the apple.

They can as well go under the contract or they can sue in state court. This situation is a contract, it's just a plain breach of contract claim. There is no public policy about breach of contract. If there was a public policy regarding a breach of contract cause of action similar to the Garibaldi situation, the J.I. Case wouldn't have come down. There is no particular breach of contract public policy in the area of labor law.

The second point I want to raise has to do with the affidavits put in by plaintiff, by the union representatives. That is that the unions are claiming that they feel they could not have arbitrated these cases. I think those affidavits are irrelevant in the sense that certainly the union, as a party to the contracts, is not competent to say whether the arbitration clause would cover this dispute. That's an issue of law. It's covered by the arbitration clause on its face.

The application of the contract is one of the very points of the arbitration clause which is subject to the arbitrator's determination. And I am not surprised that the union would put these affidavits in because the union has a real problem here on a duty of fair representation claim.

Of course, they are going to say we couldn't take this to an arbitrator because if they said they could, there is a real question as to whether they've met their duty which raises another issue of federal labor law.

There is nothing in their complaint that states that the promises on which they are relying, the pre-unit promises pertain solely to their employment with Caterpillar only in non-bargaining unit [positions]. The promises on which they are relying are promises that Caterpillar allegedly made to these employees where in Caterpillar said, as long as you work for Caterpillar, whether

bargaining unit jobs or non-bargaining unit jobs, we are going to provide certain things for you such as [employment] for life.

Now, they are in the bargaining unit jobs. If they have a dispute, they have the grievance remedy.

Mr. Wollett: I have a couple of things I would like to say, Your Honor.

I think the relevant consideration in this case is essentially set out in the recent Ninth Circuit decision, *Hunter versus United Van Lines*. The question of whether or not removal is proper is determined by two factors: First of all, whether there is preemption, and secondly, assuming there is preemption, whether or not plaintiffs are provided with a federal cause of action.

And obviously we have argued at length there is no preemption here and we've certainly made it clear that there is no federal cause of action for these people.

The contract makes that clear, quoted language from the contract in our last brief which narrowly defines the arbitrator's powers to interpretation of the contract along with the union contract. It does not permit the arbitrator to go outside the union contract.

And secondly, we have got declarations from every responsible union official, from the business agent to the present to chief stewards. They make it just as plain as day that there is no jurisdiction under the contract. And if there is no jurisdiction under the contract, then there is no federal remedy available to the plaintiff's, Your Honor, and therefore, there can't be removal under those circumstances.

Now, counsel cites the Del Webb case. In fact, the Del Webb case doesn't help the defendants because the Del Webb case involved a plaintiff who was always a member of the bargaining unit, or at least the Ninth Circuit states it was undisputed that the plaintiff in that case, even though he held a position of vice president, was considered to be a member of the bargaining unit, and nobody argued it wasn't. So I don't think the Del Webb case is of any assistance to the defendants at all.

Defendants criticize plaintiffs for "a parade of horribles," when we list some hypothetical situations for Your Honor's consideration regarding a situation where a person was hired into a non-collective bargaining unit position and promised $100,000 a year: On the next day demoted into a collective bargaining position; and on the third day terminated. We stated under the Caterpillar's approach, that person would have no right to sue for the individual personal contract that was entered into on the first day given defendants' exotic notion of preemption.

The only parade of horribles really here is the parade of horribles characterized by the defendants when they say that if this court permits this case to go forward in state court by granting the plaintiffs' motion to remand, defendants argue that the world is going to fall on federal labor policy and national labor policy. There will be a serious devastating blow to the exclusivity of collective bargaining agreements, and the national labor policy, and to defendants' rights under the collective bargaining agreement.

In fact, I don't think any of those things are applicable. The only thing that would happen is that Caterpillar would have to answer for promises and contracts and agreements that were entered into long before the collective bargaining agreement ever came into focus in this particular case. That is the only parade of horribles that would really be in effect.

If the court grants defendants' motion to dismiss, in effect the court is permitting Caterpillar to use national labor policy [and] the preemption doctrine as a defense, as a shield to legitimate individual contracts, and we submit that that is not the law, and the J.I. Case does not support that position, nor does the Supreme Court's recent Belknap case, Your Honor.

The Court: Thank you.

The ruling of the court is as follows: First of all, on the motion to remand, the motion to remand is denied. I conclude that the complaint does state a federal labor law claim which should be cognizable under section 301. Although the plaintiff has not specifically pleaded 301, it is clear from the face of the complaint that there are disputes over employment agreements including

personal employment contracts and a collective bargaining agreement.

It appears that fairly read, the complaint also involves distinctions of hourly versus salaried employees and union and non-union status of those employees. It's also clear from the complaint that the plaintiffs, with the exception of Mr. Chambers, are hourly employees and are covered by the collective bargaining contract or work covered by the collective bargaining contract at the time of discharge, if discharge already occurred.

And that the issue, precipient fact, I should say, giving rise to this complaint, is the closure of the defendants' plant and the reduction or elimination of its work force. For all those reasons, I believe it states a federal labor law cause of action and is cognizable in this court under section 301 and it was properly here.

With respect to the motion to dismiss, I will grant that with leave to amend. And I am not going to make sweeping pronouncements of law here in this case with respect to preemption or the exclusivity of union remedies, the collective bargaining remedies. Obviously those are points that are going to be raised by the defense and obviously ones I will have to rule on at some time.

However, it seems to me that the posture we are in here where the plaintiff has pleaded or attempted to plead a state cause of action. He should first be given an opportunity to file an amended complaint which attempts to plead his way around preemption or with respect to the exhaustion of remedies issue attempts to show that it's not applicable or futile or whatever the exemptions are to the rule on exhaustion of collective bargaining remedies.

So the motion to dismiss will be granted, but with the understanding that I am not making any rulings as a matter of law that are binding in this case in the future with respect to preemption or exhaustion of remedies. That will have to come in the next round.

Mr. Wollett: Two questions, Your Honor: With respect to the motion to dismiss with leave to amend, may I have 30 days?

The Court: Oh, yes, certainly.

Mr. Wollett: And the other question with respect to plaintiff Chambers—

The Court: I think you should simply hold Mr. Chambers in abeyance at the moment and not do anything with him until we see how these final pleadings shake out, unless you have some other suggestion.

Mr. Wollett: I guess not, Your Honor.

The Court: I think just replead with respect to Chambers' status also; however, if you feel it's better to serve Mr. Chambers' interest by getting him out of this case and having him file his own state court action, if you feel that is a better remedy for him and he is agreeable with that, that may be the thing to do, is drop him as a plaintiff in this case and let him go his own way. That is up to you.

Mr. Wollett: I just, my thinking on Mr. Chambers, I sense the court agrees at least with that part of my argument, there is no jurisdiction here over Mr. Chambers.

The Court: I think there is no question he has never been covered by a collective bargaining agreement. I think he is an employee claiming an individual contract and that's essentially a state court cause of action. If he wants to go back to state court, I think you could dismiss him out of here and go back to state court.

How that impacts the overall action and what your tactics are there and how much Mr. Chambers agrees or disagrees with that, is really up to Mr. Chambers.

Mr. Wollett: I guess I would take the position that we ought to go ahead with the court's ruling and just remand Chambers back to state court.

The Court: Well, are you sure that is what you want to do?

Why don't you wait until you file your amended pleadings, think about it, you have 30 days. Wait until you file your amended pleadings. If you want to keep Mr. Chambers in this case, keep him and we will see what happens. If you want him out of it, then I think we are at an early stage, you can dismiss on behalf of

Chambers. I will make that dismissal without prejudice and you can file a new action in state court.

Mr. Wollett: Is there going to be an order prepared?

The Court: I wish the defendant to prepare an order.

Mr. Scholick: Thank you.

The Court: The plaintiff's motion to remand is denied. Defendant's motion to dismiss is granted with 30 days leave to amend.

Mr. Wollett: Would it be possible for me to review the order before it is submitted to the court?

The Court: Oh, yes, please do that.

(Whereupon, these proceedings were concluded.)

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Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 85-1972
D.C. No. C-85-1346-CAL

Cecil Williams, Clyde Ward, Frederick Walker, Robert A. Van Buren, Clark A. Torres, John Tennant, James Payton, James A. Morretti, Andrew Horvath, Richard L. Gonzales, Willie Crum, Peter Carnute, and Joel Bryan,
Plaintiffs/Appellants,

vs.

Caterpillar Tractor Company, Robert E. Gilmore, Don Fowler, Jeffrey A. Glickman, A.E. Mathisen, Keith Wheeler, and Does I through XX, inclusive,
Defendants/Appellees.

ORDER

[Filed Aug. 7, 1986]

Before: BROWNING, Chief Judge, and TANG and BEEZER, Circuit Judges

The appellees' have filed two petitions for rehearing and suggestions for rehearing en banc—one in response to the original opinion filed April 7, 1986, and one in response to the amended opinion filed June 12, 1986. Both petitions were ordered filed and circulated to all active judges.

The panel, as constituted above, has unanimously voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are DENIED, and the suggestions for rehearing en banc are REJECTED.

Appendix D

Gary P. Scholick, Esq.
Littler, Mendelson, Fastiff & Tichy
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendants
Caterpillar Tractor Co., Robert E. Gilmore,
Don Fowler, Jeffrey A. Glickman,
A. E. Mathisen and Keith K. Wheeler

No. 85-1346-CAL
United States District Court
Northern District of California

Cecil Williams, Clyde Ward,
Frederick Walker, Robert A. Van Buren,
Clark A. Torres, John Tennant,
James Payton, Clarence Northern,
James A. Moretti, Richard Kanuse,
Andrew Horvath, Lee Green,
Richard L. Gonzales, Willie Crum,
Fred Chambers, Pete Carnute and Joel Bryan,
Plaintiffs,

vs.

Caterpillar Tractor Company,
Robert E. Gilmore, Don Fowler,
Jeffrey A. Glickman, A. E. Mathisen,
Keith Wheeler and Does I through XX, inclusive,
Defendants.

PETITION FOR REMOVAL
[Filed Feb. 1, 1985]

TO: THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

The Petition for Removal of Caterpillar Tractor Co., Robert E. Gilmore, Don Fowler, Jeffrey A. Glickman, A. E. Mathisen and Keith K. Wheeler respectfully shows:

1. On or about December 17, 1984, an action was commenced against Caterpillar Tractor Co., Robert E. Gilmore, Don Fowler, Jeffrey A. Glickman, A. E. Mathisen and Keith K. Wheeler in the Superior Court of the State of California, in and for the County of Alameda, entitled *Cecil Williams, Clyde Ward, Frederick Walker, Robert A. Van Buren, Clark A. Torres, John Tennant, James Payton, Clarence Northern, James A. Moretti, Richard Kanuse, Andrew Horvath, Lee Green, Richard L. Gonzales, Willie Crum, Fred Chambers, Pete Carnute, and Joel Bryan v. Caterpillar Tractor Company, Robert E. Gilmore, Don Fowler, Jeffrey A. Glickman, A. E. Mathisen, Keith Wheeler and Does I through XX inclusive,* Case No. H-103848-4. Defendants have not been served with the Complaint, but learned of the action through the media on or about January 3, 1985. A copy of the Complaint is annexed hereto and labelled Exhibit A. No further proceedings have been had before the Superior Court.

2. Although not served, each Defendant joins in this Petition for Removal.

3. This Complaint For Damages, Breach Of Contract, Breach Of Covenant Of Good Faith And Fair Dealing, Intentional Infliction Of Emotional Distress And Fraud is a civil action of which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1441 and 29 U.S.C. § 185, and is one which may be removed to this Court pursuant to the provisions of 28 U.S.C. § 1441, in that:

a. This Petition is filed by each of the named Defendants; the Defendants designated as Does I through XX are fictitious Defendants and are not parties to this action.

b. Plaintiff Williams alleges, among other things, that he was originally hired as an hourly (i.e., union) employee, that he has been an hourly employee since at

least May 1980, and thus covered by a collective bargaining agreement, and that at the time of his scheduled termination, he will be an hourly employee covered by a collective bargaining agreement (Complaint, ¶¶ 10, 29, 32-33); Plaintiffs Ward, Van Buren, Torres, Tennant, Payton, Northern, Moretti, Kanuse, Horvath, Green, Crum, Carnute and Bryan assert that they were originally hired as hourly employees, that they have been hourly employees since at least May 1983, and thus covered by a collective bargaining agreement, and that at the time of their scheduled terminations they will be hourly employees covered by a collective bargaining agreement (Complaint, ¶¶ 11-21, 23, 25-26, 29, 32-33); Plaintiff Gonzales asserts, among other things, that he was originally hired as an hourly employee, that he has been an hourly employee since January 10, 1984, and thus covered by a collective bargaining agreement, and that at the time of his scheduled termination he will be an hourly employee covered by a collective bargaining agreement (Complaint, ¶¶ 22, 29, 32-33). Plaintiffs further allege that, *inter alia,* a collective bargaining agreement pertains to hourly employees (Complaint, ¶ 29); while they were not hourly employees, Defendants entered into agreements with and assured Plaintiffs that their jobs would be secure and that they would continue to be employed by Defendant Caterpillar either in San Leandro or some other facility or subsidiary of Defendant Caterpillar if the San Leandro plant closed (Complaint, ¶¶ 27-29, 31); while they were hourly employees Defendants assured Plaintiffs that they would continue to be employed by Caterpillar either in San Leandro or some other facility or related company (Complaint, ¶ 31); Defendants breached their promises and employment agreement with Plaintiffs by notifying them that the San Leandro plant would be closed, that Plaintiffs would be terminated and that Plaintiffs would not be provided with continued employment either at the San Leandro facility or some other facility operated by Defendant Caterpillar (Complaint,

¶ 32); that the announced plant closure and termination of Plaintiffs was wrongful, and that Defendants' breach of Plaintiffs' total employment agreements resulted in substantial losses in earnings, retirement benefits and other benefits (Complaint, ¶¶ 33-34).

c. Plaintiffs Williams, Ward, Walker, Van Buren, Torres, Tennant, Payton, Northern, Moretti, Kanuse, Horvath, Green, Gonzales, Crum, Carnute and Bryan are members of, and represented by the International Association of Machinists, AFL-CIO, District Lodge No. 115, Local Lodge No. 284, a labor organization representing certain of the hourly employees of Caterpillar Tractor Co. Caterpillar Tractor Co. is an employer in an industry affecting commerce.

d. Plaintiffs Williams's, Ward's, Walker's, Van Buren's, Torres's, Tennant's, Payton's, Northern's, Moretti's, Kanuse's, Horvath's, Green's, Gonzales's, Crum's, Carnute's and Bryan's terms and conditions of employment, including terms and conditions relating specifically to termination, plant closure and severance rights, were governed at all relevant times by a collective bargaining agreement between Caterpillar Tractor Co. and the International Association of Machinists, and applicable Letters of Understanding, a copy of which is attached hereto as Exhibit B. This agreement contained a mandatory grievance/arbitration procedure relating to any and all disputes between the Company and its employees, including the disputes raised in Plaintiffs' Complaint (Article X). This collective bargaining agreement was entered into on April 25, 1983, and covered the period May 1, 1983 through September 1, 1986. It includes provisions relating specifically to "discharge" and "Plant Closing—Termination Pay" (Article 10.2(C) and 13.9). On December 14, 1983, March 15, 1984 and June 27, 1984, Defendant Caterpillar and Plaintiffs' union entered into amended collective bargaining agreements relating to, *inter alia,* plant closing benefits, rights and obligations. Copies of the

amended agreements are attached hereto as Exhibits C, D and E. The mandatory grievance/arbitration procedure applied to the amended agreements.

4. The alleged promises and agreements made with, between and among, Plaintiffs and Defendants while Plaintiffs were not hourly employees and members of the bargaining unit were, as a matter of federal substantive labor law, merged into and superseded by the above-referenced collective bargaining agreements. *See, J. I. Case Company v. NLRB,* 321 U.S. 332 (1943), *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 346 (1943), *Olguin v. Inspiration Consolidated Copper Company,* 740 F.2d 1468 (9th Cir. 1984), *Eitman v. New Orleans Public Service Inc.,* 730 F.2d 359 (5th Cir. 1984), *Musicians Local 369 v. Del E. Webb Corp.,* ____ F.2d ____, 117 L.R.R.M. 2409 (9th Cir. 1984), *Hendricks v. Airline Pilots Association International,* 696 F.2d 673, 675 (9th Cir. 1983), *Manning v. Buton,* 678 F.2d 13 (3d Cir. 1982), *Arnold v. U.S. Industries,* ____ F. Supp. ____, 111 L.R.R.M. 2714 (W.D. Va. 1981), *Trigo v. Eastern Airlines, Inc.,* 440 F. Supp. 983 (D.P.R. 1976), *Klepacky v. Craftco Corp.,* ____ F. Supp. ____, 80 L.R.R.M. 3144 (D.C. Conn. 1972). Accordingly, this action is a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined by the Labor-Management Relations Act, Section 301 (29 U.S.C. § 185), of which this Court has original jurisdiction under said section without regard to the amount in controversy. 28 U.S.C. § 1441(a). It is also an action of a civil nature founded on a claim arising, if at all, under the laws of the United States, and may be removed to this Court under the provisions of 28 U.S.C. § 1441(b) without regard to the citizenship of the parties. *See, e.g., Eitman v. New Orleans Public Service, Inc.,* 730 F.2d 359 (5th Cir. 1984), *Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209 (9th Cir. 1980).

5. This Petition is filed within 30 days after Defendants-Petitioners Caterpillar Tractor Co., Robert E. Gilmore, Don Fowler, Jeffrey A. Glickman, A. E. Mathisen and Keith K. Wheeler became aware of said Complaint.

6. Defendants-Petitioners Caterpillar Tractor Co., Robert E. Gilmore, Don Fowler, Jeffrey A. Glickman, A. E. Mathisen and Keith K. Wheeler file herewith a bond with good and sufficient surety condition, as provided by 28 U.S.C. §1446(d) and Local Rule 290-4, that they will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this action is not removable or was improperly removed.

WHEREFORE, Defendants-Petitioners Caterpillar Tractor Co., Robert E. Gilmore, Don Fowler, Jeffrey A. Glickman, A. E. Mathisen and Keith K. Wheeler pray that the above action now pending before the Superior Court of the State of California in and for the County of Alameda be removed therefrom to this Court.

DATED: February 1, 1985.

Respectfully submitted,

Littler, Mendelson, Fastiff & Tichy
A Professional Corporation

By: /s/ Gary P. Scholick
Attorneys for Defendants
Caterpillar Tractor Co.,
Robert E. Gilmore, Don Fowler,
Jeffrey A. Glickman,
A. E. Mathisen and
Keith K. Wheeler

[verification omitted]

Exhibit A

The Lawyer's Office of
George P. McCartin
Fritz Wollett
1760 Solano Avenue No. 306
Berkeley, CA 94707-2296
(415) 526-0121
Attorneys for Plaintiff, Cecil Williams, et al.,

No. H-103848-4

In the Superior Court of the State of California
in and for the County of Alameda

Cecil Williams, Clyde Ward, Frederick Walker,
Robert A. Van Buren, Clark A. Torres,
John Tennant, James Payton, Clarence Northern,
James A. Moretti, Richard Kanuse, Andrew Horvath,
Lee Green, Richard L. Gonzales, Willie Crum,
Fred Chambers, Pete Carnute, and Joel Bryan,
Plaintiffs,

vs.

Caterpillar Tractor Company,
Robert E. Gilmore, Don Fowler,
Jeffrey A. Glickman, A. E. Mathisen,
Keith Wheeler and Does I through XX inclusive,
Defendants.

Complaint for Damages (Breach of Contract,
Breach of Covenant of Good Faith and
Fair Dealing, Intentional Infliction of
Emotional Distress, Fraud), Request for
Damages, and Injunctive Relief.

[Filed Dec. 14, 1984]

Plaintiffs CECIL WILLIAMS *et al.* complain and allege as follows:

1. The true names or capacities, whether individual, corporate, associate or otherwise of defendants named herein as DOES ONE through TWENTY, inclusive, are unknown to plaintiffs,

who therefore sue such defendants by fictitious names. Plaintiffs will amend this Complaint to show such true names and capacities when they have been determined.

2. Plaintiffs are residents of the County of Alameda, State of California.

3. At all material times defendant CATERPILLAR TRACTOR COMPANY (hereinafter Caterpillar) was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, engaged in the business of manufacturing heavy equipment. Caterpillar maintains a manufacturing factory in San Leandro, California, in the County of Alameda.

4. At all material times defendant ROBERT E. GILMORE (hereinafter Gilmore) was and is a resident of the State of Illinois. Gilmore was President of Caterpillar Tractor Corporation; and in doing the acts alleged herein he was acting within the course and scope of his employment, and his acts were authorized and ratified by defendant Caterpillar.

5. At all material times defendant DON FOWLER (hereinafter Fowler) was and is a resident of the State of California. Fowler was and is an employee and agent of Caterpillar, holding the job title of Plant Manager, and in doing the acts alleged herein he was acting within the course and scope of his employment, which acts were authorized and ratified by defendant Caterpillar.

6. At all material times defendant JEFFREY A. GLICKMAN (hereinafter Glickman) was and is a resident of the State of California and was an employee and agent of Caterpillar holding the job title of Employee Relations Manager and in so doing the acts alleged herein he was acting within the course and scope of his employment, which acts were authorized and ratified by defendant Caterpillar.

7. At all material times defendant A.E. MATHISEN (hereinafter Mathisen) was and is a resident of the State of California and was an employee and agent of Caterpillar holding the job title

of Facility Manager, and in so doing the acts alleged herein he was acting within the course and scope of his employment, which acts were authorized and ratified by defendant Caterpillar.

8. At all material times defendant KEITH WHEELER (hereinafter Wheeler) was and is a resident of the State of California and was an employee and agent of Caterpillar holding the job title of Personnel Services Manager, and in so doing the acts alleged herein he was acting within the course and scope of his employment, which acts were authorized and ratified by defendant Caterpillar.

9. At all material times each of the fictitious defendants was the agent, representative or employee of defendant Caterpillar and was acting within the course and scope of his agency, representative or employment capacity which acts were authorized and ratified by defendant Caterpillar.

10. Plaintiff CECIL WILLIAMS has been employed by defendant Caterpillar for nineteen years. He has been advanced from hourly positions to the management position of Training Supervisor, which he held until May 1980, when he was reduced to an hourly position of Tool Room Machinist.

11. Plaintiff CLYDE WARD served for sixteen years in various positions at the defendant Caterpillar. During this time he advanced from hourly positions to management positions which included Foreman and Machine Shop Supervisor. He was reduced to an hourly position of Machine Specialist November 7, 1982.

12. Plaintiff FREDERICK WALKER has twenty years service with defendant Caterpillar. Plaintiff Walker advanced from hourly to weekly positions including the position of Purchasing Analyst which he held until his downgrade to Machine Operator Specialist in November 1982.

13. Plaintiff ROBERT A. VAN BUREN enjoyed eighteen years of employment with defendant Caterpillar. He held hourly positions until his promotion to various weekly positions which included Planning Processor and Tooling Analyst. On November

1, 1982 plaintiff Van Buren was reduced to the hourly position of machinist.

14. Plaintiff CLARK A. TORRES was employed by defendant Caterpillar for twenty-eight years. During that time he progressed from hourly to various weekly payroll positions which he held until 1982, when he was reduced to an hourly position as Order Filler.

15. Plaintiff JOHN TENNANT with 22 years of service with defendant Caterpillar, held numerous positions and was advanced to the weekly position of Tool Analyst, from which he was reduced to an hourly job as a Machine Operator on June 2, 1982.

16. Plaintiff JAMES PAYTON served the defendant corporation for sixteen and one half years. He progressed to a management position of Shop Foreman which he held until November 1982, at which time he was downgraded to an hourly position of Machinist.

17. Plaintiff CLARENCE NORTHERN has had twenty years of service with Caterpillar Tractor. During plaintiff Northern's employment he progressed from various hourly positions to weekly positions until he was demoted back to an hourly position of Journeyman Machine Operator in March of 1982.

18. Plaintiff JAMES A. MORETTI was employed by defendant Caterpillar for eighteen years. He advanced from hourly positions to various weekly positions including Chemist and Lab Analyst. He was downgraded to the hourly position of Specialist G on November 1, 1982.

19. Plaintiff RICHARD KANUSE was employed by defendant Caterpillar for twenty-two years. He served in various hourly positions and then in the weekly positions of Standards Applicator and Planning Processor. Plaintiff Kanuse was downgraded to Journeyman Machine Operator August 1, 1983.

20. Plaintiff ANDREW HORVATH was employed by Caterpillar Tractor for seventeen years, during which time he held various hourly jobs until he was promoted to Machine Shop Supervisor. He was reduced in grade to an hourly position as Machinist in June 1982.

21. Plaintiff LEE GREEN was employed by Caterpillar Tractor for 16 years. She was employed in various hourly jobs and then promoted to the weekly position of Time Clerk which she held until being reduced to the hourly job of Machine Operator in November 1982.

22. Plaintiff RICHARD L. GONZALES was employed in various positions with defendant Caterpillar for sixteen years. At first plaintiff Gonzalez held hourly positions and later was promoted to management as a Production Line Supervisor and then to a weekly position as an Analyst. He was downgraded to the hourly position of Machinist January 10, 1984.

23. Plaintiff WILLIE CRUM has been employed by defendant Caterpillar for twenty-one years. During these years he continually advanced from hourly positions to the salaried positions of Foreman and Supervisor, until he was downgraded back to an hourly position in the machine shop in June 1982.

24. Plaintiff FRED CHAMBERS was employed by the defendant Caterpillar for 19 years advancing from the hourly and weekly positions until promotion to management positions of Foreman and General Foreman. In August 1982 he was reduced to a weekly position of Tool Designer.

25. Plaintiff PETER CARNUTE was employed for twenty and one half years at Caterpillar Tractor. He held various hourly positions until his promotion to the weekly position as Layout Planner. He was downgraded back to hourly in April 1982.

26. Plaintiff JOEL BRYAN was employed with the defendant corporation for sixteen years. During his career with defendant corporation he advanced from hourly positions to various management positions including Manufacturing Foreman and Material Control Supervisor. He was downgraded to the hourly position of Machinist in October 1982.

27. Beginning at the time they were hired, at various times between 1956 and 1968, and continuing throughout plaintiffs' period of employment with Caterpillar there existed an employment agreement between plaintiffs and Caterpillar evidenced by various written and oral representations by Caterpillar to plaintiffs

which, at the time of plaintiffs' downgrade from managers or weekly salaried positions, included but were not limited to the following:

A. During the course of plaintiffs' employment, as management or weekly salaried employees, ranging from 16 to 28 years with Caterpillar, the corporation made clear to plaintiffs its intention to employ them indefinitely by promoting them from entry level hourly positions to mid-level technical or weekly positions and to management positions.

B. Plaintiffs consistently received favorable performance evaluations from the corporation and its agents as well as payment increases and bonuses and commissions. Plaintiffs have rarely, if at all, received unsatisfactory written evaluations.

C. At various times throughout their non-union employment with Caterpillar, plaintiffs underwent training in conjunction with job promotions and job assignments. At these times plaintiffs were informed that these job changes were being made in order to enhance further their careers with Caterpillar and to provide additional job security.

D. Plaintiffs were orally informed by defendants throughout their non-union employment with Caterpillar that they were good employees, that they could look forward to indefinite and lasting employment with the corporation and that they could count on the corporation to take care of them, even when a slowdown in business resulted in downgrades or even in the case of a closing of the San Leandro facility of Caterpillar.

E. At the time of their hire and during the course of their non-union employment, plaintiffs received copies of various employment memoranda, manuals, brochures and handbooks from Caterpillar. These materials assured employees that they would be treated fairly by Caterpillar and that employees who performed their job duties satisfactorily would have a career with the company. These employment memoranda, manuals, brochures and handbooks provided plaintiffs with the assurance that their employment with Caterpillar would be stable and lasting. These statements appeared in the employee handbook entitled "Welcome to Caterpillar" as follows:

As a newcomer, you probably want to learn more about Caterpillar—its people, policies, plants and products. That's what this booklet is all about. We hope today is the start of a long and rewarding work experience. Your job is not only important to you and your family, but also to Caterpillar. It takes the efforts of all of us to continue to manufacture products of the highest quality. Your future and Caterpillar's depend on this accomplishment.

Your first job, and the way in which you perform it, can lead to further opportunities at Caterpillar. Company policy provides for equal opportunities regardless of sex, race, color, age, religion, or national origin. This is true for training and advancement, as well as for employment opportunities.

One of the first people you will meet is your supervisor. He or she is responsible for helping you to do your best, and is interested in your progress. Your supervisor knows your job, and wants to understand your problems. Ask questions—that's the way to learn. Mutual confidence, honesty and understanding between you and your supervisor will help to promote an atmosphere that encourages productive, satisfying work.

The longer you are with Caterpillar, the more your length of service will mean to you.

As you get acquainted, you'll meet people who have been with the Company for many years.

If you ask these folks what they like about Caterpillar they'll tell you its more than just the pay, good working conditions, and a sense of accomplishment.

A Caterpillar job offers many employment benefits and services. These are part of the total compensation earned for conscientious, quality work.

From this day on, we hope you have a satisfying and rewarding work experience with Caterpillar.

Great potential for Caterpillar's continued growth lies outside the United States. Caterpillar machines and equip-

ment are needed for the economic development of nations seeking to feed, clothe, and house their steadily growing populations at standards of living significantly above present levels. Reflecting this need, Caterpillar sales outside the United States generally exceed 45 percent of its total annual volume. The Company is one of the nation's largest exporters.

On October 1, 1974, Caterpillar published a brochure of its own business ethics and beliefs "dating back to the turn of the century," entitled "A Code of Worldwide Business Conduct and Operating Principles." Caterpillar stated in the brochure that the Code was published in response "to increasing public calls for standards, rules and codes of conduct" for large corporations. The Code was addressed "TO CATERPILLAR PEOPLE" and purported to set forth rules of conduct for the Company and its employees. The Code was distributed to employees, and the revised version of the Code, dated May 1, 1982, contained the following assurances and representations, which had been stated in earlier Codes distributed to employees regarding employment:

BUSINESS ETHICS

The law is a floor. Ethical business conduct should normally exist at a level well above the minimum required by law.

One of a company's most valuable assets is a reputation for integrity. If that be tarnished, customers, investors, suppliers, employees, and those who sell our products will seek affiliation with other, more attractive companies. We intend to hold to a single high standard of integrity everywhere. We will keep our word. We won't promise more than we can reasonably expect to deliver; nor will we make commitments we don't intend to keep.

The goal of corporate communication is the truth—well and persuasively told. In our advertising and other public communications, we will avoid not only untruths, but also exaggeration, overstatement, and boastfulness. . . .

We seek long-lasting relationships—based on integrity—with all whose activities touch upon our own.

The ethical performance of the enterprise is the sum of the ethics of the men and women who work here. Thus, we are all expected to adhere to high standards of personal integrity. For example perjury or any other illegal act ostensibly taken to 'protect' the Company is wrong. A sale made because of deception is wrong. A production quota achieved through questionable means or figures is wrong. The end doesn't justify the means.

HUMAN RESOURCES

People have intrinsic worth and dignity. We believe any system or institution that subtracts from that worth is wrong.

Our industrial experience shows that involvement in work is inherent in people's natural state. Men and women want to work, to contribute, to be a factor in improving things. Few people really wish to leave the job feeling they haven't made a contribution, or been challenged in some way.

If industry errs, we believe it's often on the side of not fully utilizing the human energies, skills, and loyalties that are available—for the intelligent asking—from its own employees.

Toward that end, we intend to treat people as individual human beings—to be considered one at a time, not as a 'commodity' simply to be employed. This is to be reflected in all of our relationships, inside and outside of the company.

HUMAN RELATIONSHIPS

We aspire to a high standard of excellence in human relationships. Specifically, we intend:

1. To select and place employees on the basis of qualifications for the work to be performed—without discrimination in terms of race, religion, national origin, color, sex, age, or handicap unrelated to the task at hand . . .

4. To maintain uniform, reasonable standards of work, and strive to offer people opportunities to be challenged and make best use of their abilities.

5. To encourage self-development, and assist employees in improving and broadening their job skills . . .

7. To provide employees with timely information concerning company operations and results, as well as other work-related matters in which they logically have an interest.

8. To promote from within the corporate organization—in the absence of factors that persuasively argue otherwise.

9. To compensate people fairly, according to their contributions to the company, within the framework of national and local practices.

10. To develop human relationships that inspire respect for, and confidence and trust in, the company—whether or not employees are members of a union . . .

11. To make employment stabilization a major factor in corporate decisions. We shall give high priority to providing people the most stable, secure employment consistent with the long-term success and growth of Caterpillar . . .

14. To create an environment which develops a feeling of responsibility within every employee for the overall performance and well-being of Caterpillar—especially as we seek improvement in containment of costs, avoidance of waste, adherence to quality standards, greater productivity, and better utilization of assets.

15. To give special effort to working directly with each other in a helpful, friendly way—seeking to avoid bureaucracy and other hazards common to large organizations—and remembering that the Golden Rule is as

applicable to human relationships in the work-place as it is in the community and home.

REPORTING CODE COMPLIANCE

Each officer, subsidiary head, plant or parts department manager, and department head shall prepare a memorandum by the close of each year: (1) affirming a full knowledge and understanding of this Code; and (2) reporting any events or activities which might cause an impartial observer to conclude that the Code hasn't been fully followed. These reports should be sent directly to the company's General Counsel; General Offices; Peoria, Illinois.

F. These representations were made to plaintiffs by defendants while plaintiffs were employed as managers or weekly salaried employees. Even on the occasion when plaintiffs were notified they would be downgraded to hourly positions plaintiffs' supervisors assured them that such downgrades were only temporary and that they would soon be returned to their management or weekly positions. In addition, while serving Caterpillar as managers or weekly salaried employees, plaintiffs were assured that if the San Leandro facility of Caterpillar ever closed, Caterpillar would provide employment opportunities for plaintiffs at other facilities of Caterpillar, its subsidiaries, divisions or related companies.

G. As a result of the representations and assurances given to plaintiffs by defendants, plaintiffs were induced to remain in the employ of Caterpillar and did not seek employment elsewhere, believing that they would work for Caterpillar indefinitely, as long as their job performance remained satisfactory.

28. As a result of these and other representations by Caterpillar and its agents to plaintiffs, plaintiffs understood that their employment was to be of indefinite duration and that they would be able to continue their employment with Caterpillar indefinitely as long as they carried out their duties in a proper and competent manner. Plaintiffs regularly received promotions, salary increases and satisfactory evaluations pursuant to their employment agreements and were rarely, if at all, subjected to any formal disciplinary action. Therefore, plaintiffs assumed that their performance

of the total employment agreement was satisfactory to Caterpillar and that Caterpillar would provide them a career as promised.

29. These actions and conduct by defendant Caterpillar and its agents constituted an express agreement on the part of Caterpillar not to terminate the employment of plaintiffs for so long as their job performance was satisfactory or not detrimental to the interests of the Company and not to terminate plaintiffs on the basis of their refusal to take action which violated public policy or law. Plaintiffs understood said total employment to have this effect. These promises were continually and repeatedly made to plaintiffs while they were management or weekly salaried employees and thereby constituted a total employment agreement wholly independent of the collective bargaining agreement pertaining to hourly employees.

FIRST CAUSE OF ACTION
(Breach of Contract)

As a First Cause of Action against defendants plaintiffs allege:

30. Plaintiffs refer to Paragraphs 1 through 29, inclusive, and reallege and incorporate the same herein by reference.

31. Beginning in 1980 and continuing thereafter, defendants have downgraded plaintiffs from management and weekly positions to hourly positions. During this period of time, defendants continued to assure plaintiffs that defendants would adhere to the agreement made with plaintiffs while plaintiffs were management or weekly salaried employees that their jobs were secure and that they would continue to be employed by Caterpillar in the future either in San Leandro or in some other facility of Caterpillar, its subsidiaries, divisions or related companies. In reliance thereon, plaintiffs continued to remain in Caterpillar's employ rather than seeking other employment.

32. On December 15, 1983, defendants breached said employment agreement by notifying plaintiffs that the San Leandro plant would be closed and subsequently advising plaintiffs that they would be terminated without regard to or in compliance with the requirements of the aforesaid agreement. Defendants refused

to provide plaintiffs with continued employment either at the San Leandro facility or at any other facility operated by Caterpillar or by its divisions, subsidiaries or related companies. At the time defendants notified plaintiffs that the plant would be closing and subsequently when they notified plaintiffs that they would be terminated, defendants knew that these terminations were wholly inconsistent and in breach of defendant's promises, assurances and representations of continued employment with Caterpillar as detailed in paragraphs 27 through 29 and 31 above.

33. The announced plant closure and termination of plaintiffs, pursuant to the acts described in Paragraph 32, is wrongful and in breach of the aforesaid agreement in that performance by plaintiffs was wholly satisfactory and not detrimental to the interests of defendant Caterpillar. Since the date of the notice to plaintiffs of their terminations, defendant Caterpillar and its agents have failed and refused and continue to fail and refuse to permit plaintiffs to perform under the aforesaid agreement beyond the date of their scheduled termination.

34. As the proximate result of defendants' breach of the total employment agreement with plaintiffs, plaintiffs have suffered and will continue to suffer substantial losses in earnings, retirement benefits, and other benefits which they would have received had defendants not breached said agreement.

35. Plaintiffs are not certain at this time as to the full extent of the damages which they have sustained or will sustain in the future as a result of the above-described breach of contract. Plaintiffs pray leave to amend this Complaint to allege the exact amount of salary and other benefits when the same have been ascertained.

WHEREFORE, plaintiffs pray judgment as herein set forth.

SECOND CAUSE OF ACTION
(Breach of Covenant of Good Faith and Fair Dealing)

For a Second and Separate Cause of Action against defendants, plaintiffs allege:

36. Plaintiffs refer to Paragraphs 1 through 29 and 31-32, inclusive, and reallege and incorporate the same herein by reference.

37. The aforesaid employment agreement has an implied-in-law covenant of good faith and fair dealing by which defendant Caterpillar, through its agents, promised to give full cooperation to plaintiffs in their performance under said employment agreement and to refrain from engaging in any act which would prevent or impede the plaintiffs from performing all of the conditions of the agreement to be performed by them. Specifically said covenant of good faith and fair dealing required defendant Caterpillar and its agents to perform fairly, honestly, and reasonably the duties and conditions of said agreement.

38. Defendant Caterpillar breached said implied covenant of good faith and fair dealing by:

A. Downgrading plaintiffs from management and weekly positions to hourly positions;

B. Assuring plaintiffs prior to their downgrades that they would continue to be employed by Caterpillar indefinitely and that they did not have to worry about their job security with the corporation;

C. Reassuring plaintiffs at the time of their downgrades from management and weekly salaried positions that defendants would adhere to the promises of continued employment made to plaintiffs prior to their downgrades;

D. Notifying plaintiffs on December 15, 1983, that the plant would be closed and subsequently that they would be terminated without regard to compliance with the terms, conditions and requirements of the aforementioned agreement and that plaintiffs would not be allowed to continue their careers with Caterpillar at any of its subsidiaries, divisions or related companies;

E. Refusing to ensure that plaintiffs would be treated fairly and otherwise afforded the protection and benefit of the policies, rules and regulations set forth in defendant's employee manual and brochure referred to in Paragraph 27;

F. Denying, without probable cause and in bad faith, that defendant Caterpillar was obligated to provide plaintiffs with continued employment beyond their scheduled dates of termination;

G. Denying plaintiffs their rights to and benefits from permanent employment.

39. As a direct and proximate result of defendants' violations of said implied covenant of good faith and fair dealing, and of defendants' reprehensible, outrageous, willful and malicious conduct toward plaintiffs, plaintiffs have suffered harm, including destruction of plaintiffs' valuable property interest in the prospect of continued and future employment at Caterpillar.

40. The actions on the part of defendants were taken pursuant to a purposeful design, scheme and plan to deprive plaintiffs of their employment with Caterpillar. Said willful, malicious and oppressive actions have caused and continue to cause plaintiffs substantial losses in earnings, retirement benefits, and other employment benefits and have caused plaintiffs to suffer and continue to suffer humiliation, physical and emotional pain and anguish, all to their damage in an amount presently unknown to plaintiffs. Plaintiffs pray leave of the Court to amend this Complaint when these damages are more fully ascertained.

41. Defendants did the acts herein alleged maliciously, fraudulently and oppressively, and with wrongful intention of injuring plaintiffs, and from an improper and evil motive amounting to malice. Plaintiffs are thus entitled to recover $20,000,000 in punitive damages from defendants.

WHEREFORE, plaintiffs pray judgment as hereinafter set forth.

THIRD CAUSE OF ACTION
(Intentional Infliction of Mental Distress)

For a Third and Separate Cause of Action against defendants, plaintiffs allege:

42. The allegations of Paragraphs 1 through 29, 31-32 and 38 are realleged and incorporated by reference as though fully set forth.

43. By the acts described in the First and Second Causes of Action, defendants and each of them engaged in outrageous conduct which was intentional and malicious and done for the purpose of causing plaintiffs to suffer humiliation, mental anguish, and emotional and physical distress. Said actions were taken with knowledge that the plaintiffs' emotional and physical distress would thereby increase and was done with a wanton and reckless disregard of the consequences to plaintiffs.

44. As a proximate result of said actions, plaintiffs have lost and continue to lose earnings, retirement benefits, and other employment benefits and plaintiffs have suffered and continue to suffer humiliation and pain and anguish all to their damage in an amount presently unknown. Plaintiffs pray leave of the Court to amend this Complaint when these damages are more fully known.

45. The actions on the part of defendants were made pursuant to a purposeful design, scheme and plan to deprive plaintiffs of their employment with Caterpillar. Defendants, and each of them, did the acts herein alleged maliciously, fraudulently and oppressively, and with wrongful intention of injuring plaintiffs and from an improper and evil motive amounting to malice. Plaintiffs are thus entitled to recover $20,000,000 in punitive damages from defendants.

FOURTH CAUSE OF ACTION
(Fraud)

For a Fourth and Separate Cause of Action against Defendant Caterpillar plaintiffs allege:

46. The allegations of Paragraphs 1 through 29 and 31-32 and 38 of this Complaint are realleged and incorporated herein by reference.

47. At various times throughout the course of plaintiffs' employment as non-union employees, defendant corporation and its agents acting pursuant to the scope of their employment,

falsely and fraudulently represented to plaintiffs that they, the plaintiffs, would be employed by Caterpillar as long as they remained dedicated employees and as long as they demonstrated their abilities in their jobs.

48. Even after plaintiffs were reduced to hourly jobs, defendants continued to assure plaintiffs that defendants would adhere to the promises aforementioned, made prior to plaintiffs' downgrades.

49. The representations made by defendant and its agents were false in that Caterpillar did not intend to employ plaintiffs permanently and did not intend to continue their employment in accord with the policies, practices and actions set forth in Paragraph 27 of this Complaint.

50. When defendant Caterpillar and its agents made these representations to plaintiffs, they knew them to be false, and these representations were made with an intent to defraud and deceive plaintiffs and with the intent to induce plaintiffs to remain in defendant's employ until defendants terminated them.

51. Plaintiffs, at the time these representations were made by defendant Caterpillar and its agents, at the time plaintiffs accepted their positions with the corporation, and at all times during their employment with Caterpillar, were ignorant of the falsity of defendants' representations and believed them to be true. Plaintiffs accepted the jobs and continued their employment with defendant Caterpillar in the belief that the aforementioned representations were true. If they had known the actual facts they would not have taken such action but would have sought other employment. Plaintiffs had no reason to doubt the truth of the representations of defendant corporation or its agents.

52. As a direct and proximate result of the fraud and deceit of defendant Caterpillar, and reliance on the facts herein alleged, plaintiffs were damaged in an amount within the jurisdiction of Superior Court, according to proof.

53. As a further direct and proximate result of the fraud and deceit of defendant Caterpillar, plaintiffs have been damaged in an amount equal to the unpaid portion of the salary, retirement

and other benefits which they were denied effective at the time of their scheduled teminations. Plaintiffs are uncertain of the exact amount of the damage which they have sustained by reasons of the fraud and deceit of defendant as aforesaid, but believe this amount is in excess of $20,000,000. Plaintiffs pray leave of the Court to amend this complaint when these damages are more fully ascertained.

54. In doing the acts as herein alleged, defendant Caterpillar and its agents have acted with oppression, fraud, malice and with a conscious disregard of the rights of plaintiffs, and plaintiffs are entitled to punitive damages in the sum of $40,000,000 dollars.

55. Defendant corporation, and its agents, made these representations with no reasonable ground for believing them to be true in that they knew that plaintiffs would not have a career with Caterpillar, and they knew that even if plaintiffs continued to demonstrate qualities of dedication, competence and a sense of urgency about their jobs, they would not continue to be employed indefinitely by Caterpillar. Defendants further knew that they would not pay the salary and other benefits as represented. Nevertheless, defendants made these representations to plaintiffs for the purpose of inducing them to act in the manner herein alleged.

WHEREFORE, plaintiffs pray for relief as follows:

1. On all Causes of Action compensatory damages for lost earnings, bonuses, stock options, retirement benefits, insurance benefits and profit-sharing in the amount of $2,000,000 for each plaintiff or such other amount as is proven at trial with interest thereon at 10% per annum;

2. On the Second, Third and Fourth Causes of Action compensatory damages for humiliation, damage to plaintiffs' reputations, physical, mental and emotional pain and anguish in the amount of $10,000,000 or such other amount as is proven at trial with interest thereon at 10% per annum;

3. On the Second and Third Causes of Action, punitive damages in the amount of $20,000,000, and on the Fourth Cause of Action punitive damages in the amount of $40,000,000;

4. For reinstatement of plaintiffs to their positions as managers and weekly employees from which they have been wrongfully deprived;

5. On all Causes of Action costs of suit, including reasonable attorneys' fees; and

6. For such other and further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all disputed issues of fact raised by their complaint.

DATED: December 14, 1984

The Lawyer's Office of
George P. McCartin
Fritz Wollett
1760 Solano Avenue, # 306
Berkeley, CA 94707

/s/ GEORGE P. MCCARTIN
George P. McCartin
Attorney for Plaintiffs

Exhibit B

AGREEMENT
BETWEEN

CATERPILLAR TRACTOR CO.

San Leandro, California

and the

INTERNATIONAL
ASSOCIATION OF MACHINISTS

A.F. of L.-C.I.O.
DISTRICT LODGE No. 115
LOCAL LODGE No. 284
Oakland, California

MAY 1, 1983

AGREEMENT

CATERPILLAR TRACTOR CO.

San Leandro, California

and

INTERNATIONAL
ASSOCIATION OF MACHINISTS

A.F. of L.-C.I.O.
DISTRICT LODGE No. 115
LOCAL LODGE No. 284
Oakland, California

Effective *May 1, 1983*
Ending *September 1, 1986*

This Agreement dated *May 1, 1983* is between CATERPILLAR TRACTOR CO., SAN LEANDRO, CALIFORNIA, hereinafter referred to as the "Company," and the INTERNATIONAL ASSOCIATION OF MACHINISTS, A.F. of L.-C.I.O., DISTRICT LODGE NO. 115, LOCAL LODGE NO. 284, OAKLAND, CALIFORNIA, hereinafter referred to as the "Union."

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[Labor Contract Appendix A, B and C omitted]

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PURPOSE

The general purpose of this Agreement is to set forth the hours of work, rates of pay, and conditions to be observed by the Company and the Union; and to provide orderly and harmonious relations between the Company and the Union; and to secure a prompt and fair disposition of grievances.

The parties agree that wherever words such as "he," "him," "his," "Foreman," or similar words appear in this Agreement, appended Letters of Agreements and Plans relating to Pension and Group Insurance, it is understood that such words are considered asexual and refer to females and males equally.

ARTICLE 1
UNION RECOGNITION

(1.1) Employees Covered

This Agreement shall cover, and the Company recognizes the Union as the sole bargaining agent for the following employees as defined in the N.L.R.B. Certification Case No. 212 dated November 20, 1942:

"All Production and Maintenance Employees of the Company."

(1.2) Employees Not Covered

The following employees are excluded from bargaining unit specified in Section 1.1:

"All clerical and office employees, warehousemen, electricians, armed guards, and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action."

It is agreed that by "armed guards" is meant "plant guards."

ARTICLE 2
UNION SECURITY

(2.1) Conditions of Employment

Each employee shall, on and after the thirty-first day following his first day of employment in the bargaining unit, be required as a condition of employment in the bargaining unit to be and remain a member of the Union; provided, that this shall not apply (a) to any employee to whom such membership is not available on the same terms and conditions generally applicable to other members, nor (b) to any employee to whom membership in the Union is denied, or whose membership in the Union is terminated, for any reason other than his failure to tender the initiation fee and periodic dues uniformly required as a condition of acquiring or retaining such membership, nor (c) until the thirty-first day following the date on which this Agreement goes into effect to any person who on the date this Agreement goes into effect is an employee (whether or not actively working) but is not a member of the Union in good standing in accordance with its Constitution and Bylaws.

[Article 2.2—Article 7.5 omitted]

(7.6) *Company Service*

As used in this Article 7, "service" for employees hired prior to May 3, 1971 is the measurement of all full-time employment with the Company, its predecessors and subsidiaries. It includes all periods of authorized leaves as provided hereafter in Section 8.4 and periods of layoff since his last date of hire. For employees hired on or subsequent to May 3, 1971, "service" is the measurement of all periods of full-time employment with the Company since his last date of hire including all periods of authorized leaves as provided hereafter in Section 8.4 and all periods of layoff.

ARTICLE 8
SENIORITY

(8.1) Seniority Measured

(a) Seniority shall be measured from an employee's first day of employment in the bargaining unit since his last date of hire with the Company and is broken for the following reasons only:

(i) If the employee quits.

(ii) If the employee is separated and not reinstated by the Company.

(iii) If the employee fails to respond to a recall to work within five (5) days.

(iv) If an employee with less than three (3) years of seniority is laid off for a period exceeding his actual length of services, or if an employee with three (3) or more years of seniority is laid off for three years.

(v) If an employee has been on a disability leave of absence for a period of one year.

(b) An employee shall not attain seniority until he has completed a probationary period of *forty-two (42)* days of work in the employ of the Company, after which time his seniority shall date from his date of hire.

(c) With respect to downgrading or layoffs only, Shop Stewards *and Chief Stewards* shall have top seniority provided they have the necessary qualifications to satisfactorily perform the work remaining *and further provided they have not been appointed to such office after notification of a scheduled downgrade or layoff.*

(d) Laid off employees will retain recall rights for a period of time equal to their length of seniority at the time of layoff up to a maximum of thirty-six consecutive months following the date of layoff.

[Article 8.2—Article 9 omitted]

ARTICLE 10
GRIEVANCE PROCEDURE

(10.1) Definition

A grievance is defined to be any difference which may arise between the parties, or between the Company and an employee covered by this Agreement as to:

a. Any matter involving wages (except general wage adjustments), hours of work, or working conditions covered by the Agreement, or

b. Any matter involving the application or interpretation of any provisions of this Agreement.

(10.2) Adjustment

(a) It is mutually desired that grievances be satisfactorily settled as quickly as possible. When grievances arise, an earnest effort will be made by both the Company and Union to settle the differences in accordance with the steps of the grievance procedure.

(b) The parties jointly recognize that it is desirable to resolve, if possible, any question of fact relevant to any grievance at as early a Grievance Step as is reasonably possible and will cooperate with each other in an effort to do so; such cooperation shall extend, in appropriate cases, to joint investigation to establish the relevant facts.

(c) Employees shall be given disciplinary layoff, suspended from employment, or discharged only for just cause. In imposing disciplinary layoff, suspension or discharge on a current charge, the Company will not take into account any prior infractions which occurred more than three years previously nor, in the case of attendance infractions, any days of absence paid under Section 13.7 for which prior approval had been granted by the Company for such absence, provided, however, the Company will not take into account any prior infractions regarding a particular subject (attendance infractions, poor performance, etc.) which occurred

more than twelve months previously if the employee has not had any such infractions during the immediate preceding twelve months. In the event an employee has been given disciplinary layoff, suspended from employment or discharged while at work, his Foreman will send for the employee's Steward and will allow the Steward to discuss, for such time as may reasonably be necessary, the case with the employee.

(d) A grievance arising out of discharge will not be processed through Steps 1 and 2, but will be presented directly to the Third Step of the grievance procedure.

(e) Grievances regarding alleged improper disciplinary layoff, suspension from employment, discharge or layoff must be filed within three (3) working days after such disciplinary layoff, suspension from employment, discharge or layoff. Other grievances shall be without effect and void unless presented in writing fifteen (15) days from the date the employee, employees, or the Union first acquire, or by ordinary observation should have acquired, knowledge of the fact or facts upon which the grievance is based.

(f) Retroactive pay on other than grievances involving discharge shall be limited to a maximum of thirty (30) working days, except in cases of willful violation of contract, the Arbitrator may waive the thirty (30) working day limitation on retroactivity.

(g) Whenever specific titles are used for Company representatives, it is understood that these representatives may delegate their authority to others.

(h) Meetings requested by the Union will not be held on Company time except as provided in the handling of grievances. Meetings called by management, however, will not result in loss of pay for regularly scheduled hours of Union Representatives.

(i) If, in the third step of the grievance procedure, the Union considers as unsatisfactory the Company's decision on a grievance which has as its basic issue a medical disagreement wherein the findings of the Company's physician or physicians are in conflict with the findings of the employee's personal physician, the medical question shall be submitted to a third physician mutually

agreed to by the parties within five working days following the Company's decision on such grievance. The medical opinion of the third physician after examination of the employee and consultation with the other two physicians shall resolve such conflict. A copy of the third physician's findings shall be supplied to both the Company and the Union. The expense of the third physician shall be paid one-half by the Company and one-half by the Union, each of whom will be billed separately by the third physician for their share of such expense. The Union may, at its option, develop with the Company a list of mutually agreeable physicians including specialists, and/or medical facilities to which such medical disputes may be referred.

(10.3) Grievance Procedure Steps

Step 1. When a grievance arises, the grievance may be taken up by the employee directly with his immediate foreman. If the subject of an alleged grievance has been identified, upon request, the foreman shall, without undue delay, send for the Area Steward. The Area Steward and aggrieved employee shall be permitted to discuss the grievance for a reasonable period of time prior to presenting the grievance to the Foreman.

In taking the First Step of the grievance procedure, the Area Steward shall be the exclusive Union representative for any grievance arising in the Area Steward's jurisdiction. However, in the absence of the Area Steward, or if for a temporary period there is no Area Steward, the appropriate Chief Steward may represent the employees under the jurisdiction of the Area Steward involved.

Termination of any grievance in the first step of the grievance procedure, either by the Company granting relief in whole or in part or by the Union withdrawing or dropping the grievance, shall not constitute a precedent for the settlement of any future grievance in any step of the grievance procedure or in support of either party's position in arbitration; however, any such "no precedent" termination shall not constitute an eradication of the events which led to the Company action or nonaction of which the grievance complained.

Nothing in the foregoing provisions of the Step 1 shall prevent the Steward from filing a grievance on behalf of the Union if the Steward believes that the Company has committed some action or nonaction that violates the terms of the Agreement. Such Union grievance shall be processed through the grievance procedure as though it had been filed by an employee.

Step 2. If the grievance is not satisfactorily settled or an answer is not given by the foreman within two working days, the Chief Steward should refer the grievance to the superintendent. Any grievance which is not appealed to Step 2 within seven regularly scheduled work days after the First Step answer shall be deemed settled on the basis of the Company's last answer.

In taking the Second Step of the grievance procedure, the Chief Steward shall be the exclusive Union representative for any grievance arising in the Chief Steward's jurisdiction, but may be accompanied by the aggrieved employee (not to exceed one) and the Steward who handled the grievance in the first step. However, in the absence of the Chief Steward, or if for a temporary period there is no Chief Steward, one of the other Chief Stewards may represent the employees under the jurisdiction of the Chief Steward.

In Step 1 or Step 2 the grievance may also receive the attention of the general foreman, if any.

Step 3. If the grievance is not satisfactorily settled or an answer is not given by the superintendent within three working days, the Business Representative should present the grievance, in writing, to the Company's designated representative. Any grievance which is not appealed to Step 3 within ten regularly scheduled work days after the Second Step answer shall be deemed settled on the basis of the Company's last answer.

Step 3 meetings with the Third Step Grievance Committee will be held once each week on Wednesday or such other day of the week as may be mutually agreed to at 10:00 a.m., unless there are no grievances to be processed at this Step. At such meetings grievances will be discussed in chronological order of referral (except discharge grievances will be discussed first). A grievance will be scheduled for the next regular meeting if the written

appeal is received by the Company at least five regularly scheduled work days before such meeting.

The Company shall prepare minutes of each Third Step grievance meeting. A copy of such minutes shall be given to the Union no later than the next regular Third Step meeting. Such minutes shall include:

a. Date of meeting.

b. Names of those present.

c. Brief statement of each grievance.

d. Management's answer to each grievance.

(10.4) Arbitration

In the event the parties have failed to reach a satisfactory settlement in the foregoing steps of the Grievance Procedure, the Union may refer the grievance to arbitration. The request shall be in writing and shall be made within thirty (30) days following the final action taken in Step 3.

Grievances may be referred to arbitration in either, but not both, of the following two categories:

(A) those grievances wherein the parties mutually agree in the Third Step of the grievance procedure that the sole issue is whether there was "just cause" for either discharging an employee or giving an employee a disciplinary suspension.

(B) all other grievances.

(10.5) Scheduling of Arbitration

Within each category, grievances referred to arbitration shall be scheduled for hearing and an arbitrator selected in the chronological order of their referral, provided, however, that grievances involving discharges and other cases of similar accruing liabilities shall be scheduled for hearing and an arbitrator selected in the chronological order of their referral prior to such scheduling of any other grievance. The phrase "grievance involving discharge and other cases of similar accruing liabilities" shall be interpreted

to mean discharged, improper layoff, failure to recall an employee or other circumstances wherein an employee is not at work.

After a request has been made by the Union to submit a grievance involving the application or interpretation of this Agreement to arbitration, the parties shall meet for the following purposes:

(a) To decide whether the next arbitration hearing will involve cases in category A or category B as described in Section 10.4 above. In the event the Union elects to arbitrate the appropriate case in category B, all potential accruing Company liability in grievances currently in category A shall cease as of the date of the arbitration hearing. A docket of the case(s) to be considered at a given hearing shall be furnished by the Union to the Company's Labor Relations Manager in the chronological order of scheduling at least forty-five days prior to the date of the hearing.

(b) In the case of grievances from Category B, to mutually agree upon the question or questions to be submitted for decision by the Arbitrator. If such agreement is reached, the question or questions to be submitted shall be set forth in writing and shall be initialed by the parties. In the event the parties are unable to agree on the question or questions to be submitted, the written grievance as presented in the Third Step of the Grievance Procedure shall be submitted for decision by the Arbitrator, provided such written grievance set forth:

(i) The identity of the employee or employees who claim to be aggrieved.

(ii) The specific action or non-action claimed to constitute a violation of this Agreement.

(iii) The provisions of this agreement that the employee or employees claim the Company has violated and the specific remedy they seek.

In the event the Union alleges in an arbitration proceeding that additional provisions of the Agreement have been violated, which additional provisions were not included in (iii) above at the Third Step of the Grievance Procedure; the Company at its option may request and, if requested, shall receive from the Arbitrator a

recess of seven (7) days to complete such additional Arbitration preparation as it deems necessary.

(10.6) Permanent Arbitrator

The Company and the District Lodge shall, by mutual agreement, select a permanent arbitrator, and if necessary any successor permanent arbitrators, subject, however, to his or their removal by death, incapacity, resignation or request of the Company or the District Lodge. Should the Company or the District Lodge desire to terminate the appointment of a permanent arbitrator, the one so desiring shall give written notice to the other and to the permanent arbitrator terminating the latter's authority as of the date specified in such notice after which he shall have no authority to receive additional cases or to hold hearings (other than to complete any hearings in which partial evidence has been heard but not concluded); the Arbitrator shall, however, complete any hearings in which partial evidence has been heard and render decision thereon and on any pending cases in which hearings have been completed. Any case in which the Arbitrator is unable or unwilling to render a decision shall go over to the successor Arbitrator for hearing or rehearing and decision.

(10.7) Authority and Duties of the Arbitrator

The decision of the Arbitrator shall be final and binding upon all parties to the dispute; however, the Arbitrator shall have no power to change or detract from or add to the provisions of this Agreement, but shall have the power only to apply and interpret the provisions of this Agreement in reaching a decision.

It shall be incumbent upon the arbitrator to recognize that he has been engaged by the parties for the sole purpose of adjudicating disputes that are properly before him and that his conduct of the hearing should be governed accordingly. The parties have agreed that the Arbitrator should conduct an orderly hearing and that the Arbitrator should not intrude into either party's presentation so as to prevent that party from putting forward its case in the manner and sequence determined by that party subject, of course, to reasonable rules of arbitration procedure and evidence in accordance with the Arbitration Act of California.

The parties assume the sole responsibility for developing the theory, arguments and proof of their respective positions in the arbitration procedure. The Arbitrator shall respect their judgment as to the content of their presentation and shall not engage in developing additional or alternative theories, arguments or proof supportive of either party's position. The Arbitrator shall neither accept as fact, nor require the other party to refute, either party's charges, allegations or statements that are not supported by proper evidence.

The Provisions of this Section 10.7 do not authorize the arbitrator to serve as a mediator conciliator or conduct an independent investigation of fact unless the parties so mutually agree. It is the desire of both parties that the Arbitrator serve the parties in the adjudication role described above and for the purpose for which the arbitration process was originally developed—a means by which a truly impartial third party could adjudicate disputes between two parties to a labor agreement over the interpretation application or violation of that agreement.

(10.8) Briefs and Expenses

Each party shall have the privilege of filing post-hearing briefs with the Arbitrator in cases from category B. In cases from category A, the parties agree to waive the right to file a post-hearing brief.

Expenses of arbitration, including the Arbitrator's fee and expenses, shall be borne equally by both parties.

(10.9) Grievances of Compelling Urgency

Notwithstanding the provisions of Section 10.5 above, either the Union or the Company may designate a grievance from category B as a "Grievance of Compelling Urgency" and, thereby, schedule such grievance for arbitration outside of the normal chronological order. Such a designation and scheduling is subject to the following conditions:

(a) If either the Union or the Company elects to designate a particular case as a "Grievance of Compelling Urgency" and intends to schedule such case for arbitration, notification of such

designation and intent must be made to the other party at least forty-five days prior to the date of the hearing at which the case will be considered.

(b) After either the Union or the Company has designated and scheduled a grievance under this Section 10.9, each party is restricted to designating and scheduling another grievance under this Section 10.9 only after at least ten other grievances have been scheduled and arbitrated as provided in Section 10.5.

(c) When a grievance designated by the Union as a "Grievance of Compelling Urgency" is arbitrated, all potential accruing Company liability shall cease as of a date 30 days following the "Grievance of Compelling Urgency" arbitration hearing for all grievances in category B which would have been scheduled for arbitration before such grievance were it not for this Section 10.9.

(10.10) Expedited Arbitration

The foregoing provisions of this Article 10 are amended only to the extent necessary to provide an expedited arbitration procedure for grievances in category A.

If the Union is of the opinion that such a "just cause" grievance merits consideration for possible expedited arbitration, the Union shall within, but not beyond, 30 calendar days of the Company's answer in the Third Step of the grievance procedure, prepare and deliver a written "Notice of Appeal to Expedited Arbitration" to the Labor Relations Manager. If such notice is not given within such time, the grievance shall be deemed closed.

Such grievances shall be heard in the chronological order of their referral, provided however that grievances involving discharges shall be heard in the chronological order of their referral prior to the hearing of any other grievance in Expedited Arbitration.

Grievances referred under this Section 10.10 may be heard by either the Permanent Arbitrator or an Alternate Arbitrator (from a permanent panel of three Alternate Arbitrators to be agreed upon by the parties).

The parties agree to waive the right to file a post-hearing brief in such Expedited Arbitration. The Arbitrator shall render an award within 10 calendar days of receipt of the transcript or in the alternative, within 10 days of the hearing provided the Arbitrator and the parties agree at the time the hearing is scheduled that a tape recorder will be used to record the proceedings of such hearing. In either event, the Arbitrator will limit his opinion to that which is necessary to briefly explain his award.

[Article 11—Article 13.5 omitted]

(13.6) Contract Work

The Company shall continue to make the decisions as to whether work shall be performed by Company forces in any Company plant, or by others, consistent with an intention to maintain, so far as practicable, a stable work force. The Company shall make decisions of such nature with such intention taking into consideration such factors as the scope of the project or production requirement, relative costs, possession and availability of Company equipment and of employees qualified to accomplish the production without undue overtime or delay either of the specific production or of any other scheduled activity, desirability of continuity of relations with historic sources of supply and believed best utilization of all the Company's plants with a view to long-term stability and health of the enterprise as a whole.

[Article 13.7—Article 13.8 omitted]

(13.9) Plant Closing—Termination Pay

In the event the Company decides to close the San Leandro Plant, or move it to a location outside the nine Bay Area counties, during the life of this Agreement, it shall give official notice of its decision to the Union by certified letter and to employees through bulletin board announcements *180* days prior to such closing. *However, in the event such 180 days notice would impair the Company's need for speed, flexibility and confidentiality, the Company will give such notice at least 90 days prior to such closing.* Employees so affected, who possess one or more years of

seniority on the date their services are no longer requested by the Company, will receive termination pay in accordance with the following:

a. An employee with one or more years of seniority on the date his services are no longer requested by the Company will receive termination pay computed by multiplying the amount of his weekly straight-time pay by the number of full years of seniority he possessed on such date. Weekly straight-time pay will be computed by multiplying the basic hourly rate of pay any such employee was receiving on the date such bulletin board announcement was made plus any cost-of-living adjustment amount then in effect and night shift premium applicable to him on such date by forty.

b. Eligibility for termination pay shall be limited to an employee who is either an active employee, on leave of absence (including military leave), or on layoff on the day such decision is announced but retains seniority rights.

c. Retention of employees during such period of notice shall be in accordance with the provisions of Article 14. Final notice of termination will be given at least one calendar week prior to the date the employees' services will no longer be requested by the Company.

d. Payment to an eligible employee will be made in a lump sum, less required deductions, at the time such employee receives his vacation and separation payment under Section 7.3.

e. Employees who are terminated as above provided shall cease to be employees and shall have their seniority cancelled as of the date of such termination.

f. The nine Bay Area counties are San Francisco, Marin, Sonoma, Napa, Solano, Contra Costa, Alameda, San Mateo and Santa Clara.

g. The Group Insurance Plan and the Dental Plan in effect for active employees on the date such bulletin board announcement is made will continue to be applicable to an employee covered by this Section 13.9 for a period of *180* days following the first day such employees' services are no longer requested by the Com-

pany, provided the employee furnishes proof that he is not employed during such *180*-day period. In any event, on such *180th* day all such insurance shall be cancelled.

(13.10) Plant Relocation

In the event manufacturing operations of the San Leandro Plant, in whole or in part, are moved to a new Company location within the nine Bay Area counties, the Company will, subject to the provisions of the National Labor Relations Act, recognize the International Association of Machinists and the appropriate Local Lodge as the bargaining agent for "All Production and Maintenance employees of the Company" at such new location but excluding those employees specifically set forth in Section 1.2 of the current Labor Agreement. An employee whose job is moved to the new location will be transferred to the new location and any employee who refuses to accept such transfer of employment shall be separated as a quit. The terms and conditions of this labor Agreement shall be applicable in any such new location.

ARTICLE 14
DOWNGRADE, LAYOFF AND RECALL

(14.1) Layoff

In the application of the seniority provisions of this Article, a layoff shall be considered an interruption of employment caused by a reduction in force due to a reduction in regular operating schedules, but shall not include temporary layoffs which are due to a power shortage which causes a temporary cessation or reduction in operations.

In the event of layoff, employees with the least seniority, on a bargaining unit-wide basis, will be laid off and employees with the most seniority will be retained, subject to their ability to perform the available work without being trained.

[Article 14.2—Article 14.3 omitted]

(14.4) Downgrade Procedure

If, in conjunction with a reduction in force, it becomes necessary to assign an employee to a different job, he will be considered for placement and assigned in accordance with the following procedure:

a. If there is an employee in the bargaining unit with less seniority on the same shift and in the same job classification, the employee being considered for placement will displace the employee with the least seniority provided he is able to perform the work without being trained.

b. If there is an employee in the bargaining unit with less seniority on a different shift in the same job classification, the employee being considered for placement will displace the employee with least seniority, irrespective of shift, provided he is able to perform the work without being trained.

c. If an employee being considered for placement cannot be retained in the same job classification in the bargaining unit, he shall be assigned to the highest rated job in the bargaining unit to which his seniority entitles him provided he is able to perform the work without being trained. In being assigned such highest rated job, the employee being assigned will displace the employee with the least seniority, irrespective of shift.

d. If an employee cannot be placed on any job in the bargaining unit in accordance with the foregoing, he shall be laid off.

In assigning employees under the foregoing provisions of this Section, an employee shall not be assigned to a job with a higher basic hourly rate of pay than the basic hourly rate of pay of his "original classification." Except as provided in Section 3.3 any employee who refuses a job assignment under (a), (b) or (c) above shall be separated as a quit.

[Article 14.5—14.6 omitted]

(14.7) Definitions

"Without being trained" means that the employee already possesses the knowledge and skill to perform the work, needing only a brief period to familiarize himself with the work to be performed and the equipment, if any, to be operated.

A laid off employee is one who possesses seniority in the bargaining unit, but who, in connection with a reduction in force, has not been entitled to be placed or retained on any job in the bargaining unit and who as a result is not working on a job in the bargaining unit.

A downgraded employee is one who, in connection with a reduction in force, has been placed on and is working in a job in the bargaining unit (whether or not following recall from layoff) but who would have been placed or retained on a different shift or classification except for lack of sufficient seniority.

A downgraded employee's "original shift" and "original classification" are the shift and classification in which he last worked prior to becoming a downgraded employee.

Insofar as the Specialists Classifications are concerned and solely for the administration of the provisions of this Article 14, the overtime *provisions of Section 5.7 and Subsection (c) of Section 7.1, "job classification" shall* mean the sub-classifications (Benchmarks) set forth in the Addendum Appendix *B*.

ARTICLE 15
DURATION OF AGREEMENT

This Agreement shall become effective May 1, *1983*, subject to ratification by the Union membership on or before May 1, *1983*, and shall remain in force until *September 1, 1986*, and shall automatically renew itself from year to year thereafter unless notice of desire to terminate or to modify any portion or any of the terms hereof is given in writing, by either party to the other, not more than ninety (90) and not less than sixty (60) days preceding such date of expiration. If notice of desire to terminate or to

modify shall have been given, as provided herein, negotiations shall begin not later than fifteen (15) days after receipt of such notice.

Agreed and subscribed to on *April 25, 1983*.

CATERPILLAR TRACTOR CO.
San Leandro, California

Jeffrey A. Glickman	A. E. Mathisen
Donald E. Clink	Kent R. Ryden

INTERNATIONAL ASSOCIATION
OF MACHINISTS

DISTRICT LODGE NO. 115
Oakland, California

H. G. Cahill	Eric Hoffman

LOCAL LODGE NO. 284
Oakland, California

James R. Coe	Frank Detoma
Victor A. Guerrero	Albert J. Silva
M. L. Tatum	Al Willians

[Appendix A, B and Letters of Agreement 1-7 omitted]

LETTER OF AGREEMENT NO. 8

During our 1977 negotiations, the parties again discussed the application of Section 13.6 to Maintenance and Construction work and Tool Room work.

The Company reaffirmed its intention to make decisions as to whether such work shall be performed by Company forces, or by others, consistent with the intentions set forth in such Section 13.6. However, in the event any such decisions to perform such work by other than Company forces will directly result in the downgrade or layoff of employees who would otherwise perform such work if the Company had decided to perform such work with Company forces, the Company will promptly notify the Union and, within but not beyond 5 days of such notification, meet with the Union to discuss the reasons for such decisions. During the 5-day period the work involved in such decision will not be performed by other than Company forces unless a compelling emergency requires that such work be performed immediately.

[Letters of Agreement 9-12 omitted]

Exhibit C

LETTER OF AGREEMENT December 14, 1983

On September 27, 1983 the Company announced it was contemplating a decision to close the San Leandro Plant. In subsequent negotiations the parties agreed to the following additions and modifications to the provisions of Section 13.9 of the current Labor Agreement:

1. Any employee on layoff with seniority rights on the day the Company's final decision is announced, may subsequently decline a recall offer and retain eligibility for termination pay if:

a. the employee provides written notice to the Company of his or her intention to decline recall no later than the third working day prior to his or her scheduled return to work date, and

b. the employee provides written verification that he or she is engaged elsewhere in full-time employment or enrolled as a full-time student, and

c. there remains eligible for recall another employee who is able to perform the job without being trained for which the first employee is being recalled and who accepts a subsequent recall notice and fills the job. Should all eligible employees decline recall, employees will lose the option to decline such recall in reverse order of seniority, will break seniority in accordance with the provisions of Section 8.1(a)(iii) and forfeit termination pay eligibility if they fail to accept the recall.

2. Any employee on leave of absence (including military leave) or on layoff with seniority rights on the day the Company's final decision is announced, who subsequently returns to active employment and is later placed directly from active status to permanent layoff will be eligible to receive Group Insurance Plan and Dental Plan coverage in accordance with Section 13.9(g) as if they were active employees on the date the final decision is announced.

For The Company: (12/14/83) For The Union (12/14/83)

Exhibit D

LETTER OF AGREEMENT March 15, 1984

On April 25, 1983, the parties agreed on the terms of their Labor Agreement, Insurance Plan Agreement and Supplemental Agreement Relating to Non-Contributory Pension Plan. Following discussions in reference to the closing of the San Leandro Plant, the parties desired to amend such agreements and now agree to the following amendments:

1. The Insurance Plan Agreement shall be amended by adding the following new Section 7 thereto:

"Section 7. Retirement Coverage in the Event of Plant Closing

(a) Notwithstanding anything contained in the Group Insurance Plan (the "Plan") to the contrary, the provisions of this Section shall be applicable to any Employee (hereinafter, a "Special Early Retiree") who, as a result of a plant closing at the facility at which he was employed, retires and receives Special Early Retirement Benefits under Section 12 of the Supplemental Agreement Relating to Non-Contributory Pension Plan (as amended by letter of agreement) between the Company and the Union.

(b) Under this Section, a Special Early Retiree who is not eligible to retire under Paragraph 4.1(a) or 4.1(b) of the Non-Contributory Pension Plan shall have the option to elect, prior to retirement, and during any annual open enrollment period thereafter either Retirement Medical Insurance under Section 5.17 of the Plan or enrollment in the Kaiser Foundation Health Plan (the "Kaiser Plan") and the Company will pay monthly on behalf of such Retiree the lesser of

(i) full group rate for hospital, surgical and medical benefit coverage under such Section 5.17, or

(ii) the amount paid by the Company as a monthly premium for a retired Employee who is a subscriber under the Kaiser Plan.

The Retiree shall pay the balance, if any, of the monthly cost of the coverage he elects which is not paid by the Company. With respect to each such Retiree, the rate in (i) above and the premium in (ii) above, both as in effect from time to time, shall be determined from the status of such Retiree, depending upon whether he has personal coverage or personal and dependent coverage. A Special Early Retiree who is eligible to retire under Paragraph 4.1(a) or 4.1(b) of the Non-Contributory Pension Plan shall have the option to elect coverage under Section 5.17 or under the Kaiser Plan and the Company shall pay the full cost of such coverage on behalf of such a Retiree.

(c) If such Retiree, after electing the Kaiser Plan, changes his residence to a location that is not covered by the Kaiser Plan, then he shall (in accordance with the agreement then in effect between Kaiser and the Company) be eligible to enroll for coverage under Section 5.17, pursuant to paragraph (b) above, immediately after the cessation of his coverage under the Kaiser Plan. The Company expects its contractual relationship with Kaiser to continue in the future; however, if such relationship ends the Company may contract with another health maintenance or similar organization providing benefits comparable to the Kaiser Plan and the provisions of this Section shall apply by substituting such other organization for Kaiser Plan. In addition, upon notice to and consultation with the Union, the Company may offer other organizations' health programs to Special Early Retirees as alternatives to the Plan and the Kaiser Plan and the provisions of this Section shall similarly apply.

(d) Under this Section, a Special Early Retiree shall be eligible for Retirement Life

2. The Supplemental Agreement Relating to Non-Contributory Pension Plan shall be amended by adding the following new Section 12 thereto:

"Section 12.

(a) Special Early Retirement Benefits in the Event of a Plant Closing

Notwithstanding anything contained in the Pension Plan to the contrary, an employee who is laid off from the San Leandro Plant, appears to have no further opportunity for employment with the Company, is notified by the Company that his layoff is permanent, whose job is being eliminated as a result of the closing of such Plant and who is not receiving a pension pursuant to paragraph 4.1(c) of the Pension Plan may retire pursuant to this Section on the first day of any month following the date on which such permanent layoff occurs if:

(i) on the date on which his permanent layoff occurs, he possesses at least 10 years of credited service and has attained his fiftieth birthday;

(ii) he files with the Company, before his sixty-second birthday, a written application for such retirement;

(iii) he has not claimed and does not claim termination pay under the Basic Agreement, except that if, on his permanent layoff date, he is eligible to retire under paragraph 4.1(a) or 4.1(b) of the Pension Plan, then this clause (iii) shall not apply to him; and

(iv) he has not claimed and will not claim a separation payment which would otherwise be payable under any other plan of the Company;

provided, however, that no special early retirement benefits under this Section shall be payable to an employee for any period for which such employee receives any retirement benefits under any other pension plan agreement with the Company. Payment of special early retirement benefits to an employee shall commence on his retirement date (which date may not be earlier than the first day of the month immediately following the month in which he files his application to retire under this Section) in accordance with the above requirements unless he has begun or begins to receive a pension pursuant to paragraph 4.1(a) or 4.1(b) of the Pension Plan, in which case his eligibility for a pension pursuant to this Section shall terminate immediately and permanently. Such an employee who meets the above eligibility requirements (hereinafter referred to as a "special early retiree") shall retire under the terms of the Pension Plan or predecessor plan in effect

for him on his permanent layoff date, as modified by and in accordance with the provisions of this Section. The last monthly payment of special early retirement benefits shall be due for the month in which such special early retiree's death occurs, except in the case of a married special early retiree who does not waive a spouse's benefit option pursuant to subsection 6.4 of the Pension Plan and to whom subsection 6.1 of the Pension Plan applies. The provisions of subsections 6.1 and 6.4 of the Pension Plan shall be applicable to a special early retiree as if he retired pursuant to Section 4 of the Pension Plan.

(b) Amount Payable

Subject to the other provisions of this Section, a special early retiree shall be eligible to receive a monthly pension in an amount equal to the sum of:

(i) a monthly basic pension for life in an amount equal to $18.00 multiplied by the number of years of credited service possessed by him at the time of his retirement; plus

(ii) a monthly temporary pension in an amount (not exceeding Two Hundred and Ten Dollars) equal to $7.00 multiplied by the number of years of credited service possessed by him at the time of his retirement, except that for any month after he attains age sixty-two years or becomes eligible for an unreduced Old Age Insurance Benefit or a Disability Insurance Benefit under the Social Security Act this clause (ii) shall not apply; provided, however, that "age sixty-two years" shall be deemed to mean age sixty-two years and one month if such retiree's initial Social Security Old Age Insurance Benefit is paid or payable (assuming proper and timely application is made therefor) during the second month following the month in which such retiree's sixty-second birthday occurs.

(iii) An employee who retires as a result of a plant closing will be eligible for the full pension amounts shown above and other wages or earnings will have no effect.

(c) Reemployment of Special Early Retiree

Upon the full-time regular reemployment by the Company of a special early retiree, and for any month commencing on or after the date of such reemployment during which such retiree continues to be so reemployed and ending prior to the first day of the month following termination of such reemployment (hereinafter referred to as a "suspension month"):

(i) such retiree's eligibility and right to receive a pension pursuant to this Section shall be suspended as of the end of the month in which such reemployment occurs and during any such suspension month; and

(ii) if pension payments under the Pension Plan pursuant to this Section have been made for any suspension month (hereinafter referred to as an overpayment), there shall be deducted from any future payment under the Pension Plan payable to such reemployed retiree or his spouse an amount not exceeding twenty-five percent (25%) of such future payment or payments until the amount of overpayment has been recovered by the Pension Plan;

provided, however, that any pension which would, in the absence of this Section, otherwise have been payable to such retiree due to his eligibility for such pension pursuant to paragraph 4.1(a) or 4.1(b) of the plan in effect for him at the time he retired under this Section, or, if applicable, the availability of the surviving spouse's benefit which corresponds to such pension, shall not be suspended.

(d) Effect of Termination of Reemployment of Special Early Retiree

In the case of termination of reemployment with the Company of a special early retiree:

(i) upon the first day of the month following termination of such reemployment and his filing of any reapplication forms which are determined by the Company to be necessary, such retiree's pension, or that portion thereof, which was suspended in accordance with paragraph (c) above, shall be resumed, except that the monthly amounts of his

basic and temporary pension benefits which were suspended shall be increased respectively by the additional monthly amount, if any, which he would have received (based upon those factors that otherwise would have applied to him) had he, in the absence of reemployment, continued without interruption to receive a pension pursuant to this Section; and

(ii) any credited service which he accumulates due to such reemployment (hereinafter referred to as "additional credited service"), beginning with the month after the month in which such reemployment occurs and ending with the month in which such reemployment terminates, shall be credited to him separately and shall be used to determine an additional pension amount which shall be payable

(A) in such amount and at such time as shall be determined under the plan in effect for him at the time such reemployment terminates, and

(B) as either a regular pension or a deferred pension, depending on his age on the date such reemployment terminates and the total of his additional credited service and the amount of credited service which shall have been credited to him when he first received a pension pursuant to this Section.

Such retiree's additional credited service date shall be his original date of such reemployment with the Company and his additional credited service shall be computed in accordance with Section 7 of the Pension Plan by substituting "additional credited service date" for "credited service date" wherever the latter appears in such section.

(e) Special Provisions for Certain Disabled Employees

With respect to an employee who, on his permanent layoff date, is on disability leave of absence (i.e., an employee will be permanently laid off on that date even though he is on disability leave of absence pursuant to applicable terms of the Basic Agreement) and who meets, subject to the provisions of this

paragraph (e), the eligibility requirements of paragraph (a) above:

(i) his eligibility for, and the amount of, a pension pursuant to this Section shall be determined as of his permanent layoff date;

(ii) he shall file his application and retire in the manner specified in paragraph (a) above before the first to occur of A) his special early retirement date, as selected by him, B) his sixty-second birthday, and C) the date on which such disability leave of absence would have expired had he remained disabled and not filed such application; provided, however, that before the commencement of special early retirement benefits he shall have the option of electing, in lieu of special early retirement benefits, to receive a pension pursuant to paragraph 4.1(a) or 4.1(b) in accordance with the provisions of the Pension Plan which shall be applied to him as if he had never elected to become a special early retiree pursuant to this Section; and

(iii) if such employee begins to receive a pension pursuant to paragraph 4.1(a) or 4.1(b) of the Pension Plan, then his eligibility for a pension pursuant to this Section shall terminate immediately and permanently."

3. The Labor Agreement shall be amended by deleting paragraphs (a) and (b) of Section 13.9 thereof and substituting therefor the following:

"a. An employee with one or more years of seniority on the date his services are no longer requested by the Company will, if he so elects, receive termination pay computed by multiplying his hourly straight-time pay by the applicable number of hours shown in the following schedule and multiplying such amount by the number of full years of seniority he possessed on such date.

Number of Full Years of Seniority	Hours
1 but less than 10	40
10 but less than 20	48.5
20 or more	50

Hourly straight-time pay used in computing termination pay will be the basic hourly rate of pay an eligible employee was receiving

on the date such bulletin board announcement was made plus any cost-of-living adjustment amount then in effect and night shift premium applicable to him on such date.

b. Eligibility for termination pay shall be limited to an employee who is either an active employee, on leave of absence (including military leave), or on layoff on the day such decision is announced but retains seniority rights; provided, however, that an employee who is eligible to receive Special Early Retirement Benefits under the Non-Contributory Pension Plan and who is not otherwise eligible to retire under paragraph 4.1(a) or 4.1(b) of such Plan and who elects to receive such Benefits shall not be eligible for termination pay under this Section 13.9 and, if such an employee elects such pay, it shall be in lieu of such Benefits."

4. The Labor Agreement shall be amended by adding the following to Section 13.9 thereof:

"An employee who possesses one or more years of seniority (including employees on layoff or leave of absence but retain seniority rights) on the date his services are no longer requested by the Company shall be an "eligible employee" for purposes of this provision but ceases to be an "eligible employee" in the event and at the time of: death; retirement; acceptance of an offer of employment with any employer, unless otherwise mutually agreed; or the expiration of a period of two years from the date his services are no longer requested by the Company.

Each "eligible employee" shall be given an opportunity to avail himself of any or all of the following benefits and services:

a. Counseling by the Company about retirement, insurance and related benefits plan entitlements.

b. Vocational counseling by the Company or an organization selected by the Company which provides such services.

c. Training and assistance in the preparation of a resume suitable for distribution to prospective employers; such assistance shall include a listing of the jobs and/or work experience that the employee has had in the Company.

d. Outplacement assistance, in which the Company will contact the appropriate public employment service, private employ-

ment agencies, and area employers in search of employment opportunities for eligible employees; such assistance may include:

(i) the distribution of a list of employees showing their job and/or work experiences and the date their services will be available to interested agencies, area employers, or organizations with a request that the employees be given employment considerations;

(ii) arrangements for recruiting and interviews by area employers, including formal job fairs (as warranted by external placement opportunities and interest among area employers), consistent with plant operation requirements and efficiency considerations; or

(iii) solicitation of lists of job opportunities from area employers with posting or distribution of copies of these lists to interested employees.

e. Reimbursement for tuition fees and books, not to exceed a total of $1,000 upon successful completion of approved trade, business or vocational school training which will enhance the employee's opportunity for employment."

Dated this 15th day of March, 1984.

FOR THE COMPANY:	FOR THE UNION:
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/

Exhibit E

SAN LEANDRO—IAM

MEMORANDUM OF UNDERSTANDING June 27, 1984

On December 15, 1983 the Company announced its final decision to close the San Leandro Plant. In subsequent negotiations, concluding on March 15, 1984, the parties agreed to certain additions and modifications to the provisions of the current Labor Agreement, Insurance Plan Agreement and Supplemental Agreement Relating to the Non-Contributory Pension Plan.

Since March 15, 1984, several problems have been raised concerning the administration of Section 13.9, Article 14, Section 8.4, and Section 8.1 of the Labor Agreement dated April 25, 1983 (amended on March 15, 1984) during the plant closing process. In recognition of the unusual circumstances involved in placing employees on permanent layoff during the plant closing process, the parties agree to the following changes in administration.

1. Prior to August 31, 1984, all active employees will be given the opportunity to elect voluntary permanent layoff. Requests from employees for voluntary permanent layoff will be honored, within each affected job classification, in seniority order, beginning with the most senior employee. Requests will be honored consistent with the Company's need to reduce the active work force and subject to the ability of remaining employees to perform the remaining work assignments. Written forms to elect this option will be provided by the Company and must be returned no later than August 31, 1984 in order to be effective.

If the number of requests for voluntary permanent layoff exceeds the number of reductions to be made within an affected job classification, the remaining requests will be held for processing during subsequent reductions in force. If the number of requests for voluntary permanent layoff does not meet the required reduction within an affected job classification, the work force will be reduced in accordance with Article 14 of the current Labor Agreement, beginning with the least senior employee.

2. Employees are eligible, as provided for in Section 8.4 of the current Labor Agreement, for a disability leave of absence for up

to one year or until they are permanently laid off in accordance with their seniority, whichever occurs first. Any employee who, subsequent to the date of this Memorandum of Understanding, has been on a disability leave for one year, shall be placed on permanent layoff without regard to seniority instead of being separated as a quit under the provisions of Section 8.1.

3. Subsequent to the date of this Memorandum of Understanding, medically restricted employees for whom work is not available will be placed on a disability leave of absence, subject to the limitations defined in item 2 above.

4. Employees placed on permanent layoff in 1984 under the terms of this Memorandum shall have payment of their termination pay, as defined in Section 13.9, deferred until January, 1985. Employees placed on permanent layoff in 1985 shall be paid in accordance with Section 13.9.

The granting or denial of requests for voluntary permanent layoff and the determination of manpower requirements will remain within the sole discretion of the Company.

For the Company: (6/27/84)	For the Union: (6/27/84)
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/
	/s/

Littler, Mendelson, Fastiff & Tichy
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendants
Caterpillar Tractor Co.,
Robert E. Gilmore, Don Fowler,
Jeffrey A. Glickman, A. E. Mathisen
and Keith K. Wheeler

United States District Court
Northern District of California
No. C85-1346-CAL

Cecil Williams, Clyde Ward,
Frederick Walker, Robert A. Van Buren,
Clark A. Torres, John Tennant, James Payton,
Clarence Northern, James A. Moretti,
Richard Kanuse, Andrew Horvath, Lee Green,
Richard L. Gonzales, Willie Crum, Fred Chambers,
Pete Carnute and Joel Bryan,
Plaintiffs,
vs.
Caterpillar Tractor Company, Robert E. Gilmore,
Don Fowler, Jeffrey A. Glickman, A. E. Mathisen,
Keith Wheeler and Does I through XX, inclusive,
Defendants.

Notice of Motion and Motion to Dismiss Complaint
(Rule 12(b)(6))
[Filed Feb. 8, 1985]
Date: March 8, 1985
Time: 9:30 a.m.
Courtroom 10

Please Take Notice that Defendant Caterpillar Tractor Co. by its attorneys, on March 8, 1985 will move, and hereby moves, this Court, before the Honorable Charles A. Legge, District Court Judge, Courtroom No. 10, 450 Golden Gate Avenue, San Fran-

cisco, California, pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing the complaint against Defendant Caterpillar Tractor Co. on the ground that said complaint fails to state a claim upon which relief can be granted, in that Plaintiffs' claims are preempted by federal law, and that upon recharacterization of said claims as a Section 301 Labor-Management Relations Act lawsuit (29 U.S.C. § 185), the instant complaint must be dismissed because of Plaintiffs' failure to exhaust the mandatory grievance arbitration procedures set forth in their collective bargaining agreements, Plaintiffs' failure to assert the necessary allegations of a Section 301 claim, and Plaintiffs' failure to file a timely action and/or Plaintiffs' failure to assert properly a fraud claim for relief. This motion is brought solely by Defendant Caterpillar Tractor Co., and it is directed against all Plaintiffs except Plaintiff Fred Chambers.

This motion is based upon the Federal Rules of Civil Procedure, Rule 12(b)(6), this Notice of Motion and Motion to Dismiss, the Memorandum of Points and Authorities in Support of Motion to Dismiss, the Declaration of Keith W. Wheeler filed in support hereof, and supplemental memoranda and declarations which may hereinafter be submitted, and oral argument, if any.

DATED: February 7, 1985

Littler, Mendelson, Fastiff & Tichy
A Professional Corporation

By: /s/ GARY P. SCHOLICK
GARY P. SCHOLICK
Attorneys for Defendant
CATERPILLAR TRACTOR CO.

Gary P. Scholick, Esq.
Littler, Mendelson, Fastiff & Tichy
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108-2693
Telephone: (415) 433-1940

Attorneys for Defendants
Caterpillar Tractor Co.,
Robert E. Gilmore, Don Fowler,
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and Keith K. Wheeler

United States District Court
Northern District of California
No. C85-1346-CAL

Cecil Williams, Clyde Ward,
Frederick Walker, Robert A. Van Buren,
Clark A. Torres, John Tennant, James Payton,
Clarence Northern, James A. Moretti,
Richard Kanuse, Andrew Horvath, Lee Green,
Richard L. Gonzales, Willie Crum, Fred Chambers,
Pete Carnute and Joel Bryan,
Plaintiffs,
vs.
Caterpillar Tractor Company, Robert E. Gilmore,
Don Fowler, Jeffrey A. Glickman, A. E. Mathisen,
Keith Wheeler and Does I through XX, inclusive,
Defendants.

Declaration of Keith K. Wheeler in Support of Motion to Dismiss
(Rule 12(b) and (6))

[Filed Feb. 8, 1985]

I, Keith K. Wheeler, hereby declare and state:

1. I have firsthand knowledge of the facts stated herein and if called to testify as a witness thereto, I would be competent to so testify. I have been employed by Defendant Caterpillar Tractor

Co. since 1964. My present position is Personnel Services Manager. In this capacity I have custody and control over the personnel records of each of the named Plaintiffs in this action. I also have custody and control of the collective bargaining agreements between Defendant Caterpillar Tractor Co. ("Caterpillar") and the International Association of Machinists, AFL-CIO, District Lodge No. 115 and Local Lodge No. 284 (IAM).

2. Attached as Exhibit B to Defendant Caterpillar's Petition for Removal is a true and correct copy of the collective bargaining agreement between Caterpillar and the IAM, entered into on April 25, 1983 and covering the period of May 1, 1983 through September 1, 1986. It is incorporated herein by reference.

3. Attached as Exhibit C to Defendant Caterpillar's Petition for Removal is a true and correct copy of the December 14, 1983 amendment of Section 13.9 of the collective bargaining agreement entered into between Defendant Caterpillar and the IAM. It is incorporated herein by reference.

4. Attached as Exhibit D to Defendant Caterpillar's Petition for Removal is a true and correct copy of the March 15, 1984 amendment to the collective bargaining agreement between Defendant Caterpillar and the IAM. It is incorporated herein by reference.

5. Attached as Exhibit E to Defendant Caterpillar's Petition for Removal is a true and correct copy of the June 27, 1984 amendment to the collective bargaining agreement between Defendant Caterpillar and the IAM. It is incorporated herein by reference.

6. Attached hereto as Exhibit A are service records of each of the named Plaintiffs in this action. These are true and correct copies of the service records kept by Defendant Caterpillar in the regular course of its business, and it was the regular practice of Defendant Caterpillar to make such records. The service records are within my custody and control, and the data set forth on them was entered on or near the dates indicated by persons with knowledge of such data. These records show that each Plaintiff was hired in an hourly capacity by Defendant Caterpillar.

7. Each Plaintiff was hired into a job covered by IAM jurisdiction. The IAM has been recognized as the sole bargaining agent for "all production and maintenance employees of the Company" since November 29, 1942 (see Article 1 of Contract, Exhibit B of Petition for Removal). Upon hire, each Plaintiff was covered by a collective bargaining agreement between Caterpillar and the IAM.

8. The attached service records show that Plaintiff Williams was an hourly employee between December 1965 and January 1977, and since June 1980; Plaintiff Ward was an hourly employee between November 1968 and August 1973, and since November 1982; Plaintiff Walker was an hourly employee between June 1964 and January 1970, and since November 1982; Plaintiff Van Buren was an hourly employee between June 1966 and January 1971, November 1971 through February 11, 1973, and since November 1982; Plaintiff Torres was an hourly employee between September 1955 and February 23, 1962, April 30, 1963 through June 1968, and since June 1982; Plaintiff Tennant was an hourly employee between December 9, 1963 and September 1973, and since June 1982; Plaintiff Payton was an hourly employee between August 1968 and May 1973, and since November 1982; Plaintiff Northern was an hourly employee between October 1964 and January 1970, between November 4, 1979 and January 14, 1980, between June 2, 1980 and August 3, 1981, and since April 1982; Plaintiff Moretti was an hourly employee between June 15, 1966 and August 1967, and since November 1982; Plaintiff Kanuse was an hourly employee between December 1961 and March 1967, and since July 1983; Plaintiff Horvath was an hourly employee between March 1967 and December 1976, between June 1980 and May 1981, and since June 1982; Plaintiff Green was an hourly employee between January 1969 and September 1973, and since November 1982; Plaintiff Gonzales was an hourly employee between January 1969 and November 1973, and since January 1984; Plaintiff Crum was an hourly employee between February 1963 and March 1973, and since June 1982; Plaintiff Chambers was an hourly employee between 1965 and 1969; Plaintiff Carnute was an hourly employee between February 1964 and September 1974, and since April 1982;

and Plaintiff Bryan was an hourly employee between November 1968 and April 1974, and since November 1982.

9. As of the date this action was filed in the California Superior Court, December 17, 1984, all Plaintiffs except Fred Chambers were hourly employees covered by the collective bargaining agreements attached as Exhibits B, C, D and E to the instant Petition for Removal, and represented by the IAM. Defendant Caterpillar plans to end all production work at its San Leandro plant during the spring of 1985. In accordance with this planned closure, and in accordance with the collective bargaining agreement between Defendant Caterpillar and the IAM, Caterpillar has been laying off its hourly employees. The following named Plaintiffs have been laid off since December 17, 1984: Frederick Walker (laid off January 2, 1985); Robert A. Van Buren (laid off October 1, 1984); James Payton (laid off January 2, 1985); James A. Moretti (laid off October 1, 1984); Lee Green (laid off January 2, 1985); Richard L. Gonzales (laid off January 2, 1985); Pete Carnute (laid off October 1, 1984); and Joel Bryan (laid off January 2, 1985). Each of these employees was an hourly employee covered by the collective bargaining agreement as of the date of his/her layoff. The following named Plaintiffs will be laid off during March and the spring of 1985, in accordance with Defendant Caterpillar's plan to end production, and in accordance with the collective bargaining agreement between Defendant Caterpillar and the IAM: Cecil Williams; Clark A. Torres; John Tennant; Clarence Northern; Richard Kanuse; Andrew Horvath; and Willie Crum. Each of these Plaintiffs will be laid off as hourly employees, and as of the date of their layoffs they will be covered by the collective bargaining contract between Defendant Caterpillar and the IAM. Plaintiff Clyde Ward quit his employment with Defendant Caterpillar on July 6, 1984. He was an hourly employee at that time and covered by the collective bargaining agreement.

10. Caterpillar's policies provide generally that if an eligible management or weekly employee does not accept employment on the hourly payroll during a downgrade situation, the employee will be separated as a quit. Attached hereto as Exhibit B is a true and correct copy of said procedure.

11. No Plaintiff has filed a grievance with Caterpillar in accordance with the procedures of the collective bargaining agreement concerning the allegations set forth in the pending Complaint.

12. I have read the foregoing Declaration, consisting of this and five (5) other typewritten pages, and declare under penalty of perjury that it is true and correct.

Executed this 7th day of February, 1985, at San Leandro, California.

/s/ Keith K. Wheeler
KEITH K. WHEELER

[EXHIBITS OMITTED]

Appendix E

STATUTORY PROVISIONS INVOLVED

The following provisions of the removal statutes, 28 U.S.C. section 1441, *et seq.* are pertinent to this case:

Section 1441. *Actions Removable Generally.*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

The following provisions of the Labor-Management Relations Act of 1947, 29 U.S.C. section 171, *et seq.*, are pertinent to this case:

Section 201(b):

It is the policy of the United States that

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues

between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced . . . by such methods as may be provided for in any applicable agreement for the settlement of disputes.

29 U.S.C. § 171(b).

Section 203(d):

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. § 173(d).

Section 301(a):

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

OPPOSITION

BRIEF

No. 86-526 (2)

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CATERPILLAR TRACTOR COMPANY, ROBERT E. GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, HARRY MUNTZ, KEITH WHEELER, and DOES I through XX inclusive,
Petitioners,

VS.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, JAMES MORETTI, ANDREW HORVATH, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE, and JOEL BRYAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CECIL WILLIAMS, ET AL.

FRITZ WOLLETT
MCCARTIN & WOLLETT
1760 Solano Avenue, Suite 306
Berkeley, CA 94707-2296
(415) 526-0121
Attorneys for Respondents Cecil Williams, Clyde Ward, Frederick Walker, Robert A. Van Buren, Clark A. Torres, John Tennant, James Payton, James Moretti, Andrew Horvath, Richard L. Gonzales Willie Crum, Pete Carnute, and Joel Bryan

October 23, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

15pp

QUESTION PRESENTED

Is an employee's right to have a state court hear his action for breach of an individual contract of employment subject to defeasance through removal by his employer, who claims that a subsequently executed collective bargaining agreement covering a bargaining unit into which the employee was later transferred preempts his state cause of action?

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No. 86-526

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CATERPILLAR TRACTOR COMPANY, ROBERT E. GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, HARRY MUNTZ, KEITH WHEELER, and DOES I through XX inclusive,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS CECIL WILLIAMS, ET AL.

Respondents, Cecil Williams et al., Plaintiffs in the District Court and Respondents in this Court, submit that Defendants' Petition for a writ of certiorari should be denied and file this brief in opposition to the Petition.

SUPPLEMENTAL STATEMENT OF THE CASE

Between 1956 and 1968, Respondents were hired into various positions covered by a collective bargaining agreement at Caterpillar's facility in San Leandro, California. Thereafter Respondents were elevated to positions as managers or weekly salaried employees outside of the collective bargaining unit which they

held for various periods of time ranging from three to fifteen years. (App. A-97, A-98) During the period Respondents worked in jobs outside the bargaining unit, Respondents entered into individual employment contracts with Caterpillar whereby Caterpillar promised to employ Respondents as long as their job performance was satisfactory. Moreover, at this time as well, Caterpillar assured Respondents that even if the San Leandro facility were closed, Caterpillar would provide employment opportunities for them at other facilities or with related companies or subsidiaries of Caterpillar. Respondents relied upon those promises in remaining in Caterpillar's employ.

The individual employment contracts which Respondents entered into with Caterpillar did not contain any provisions relating to the collective bargaining agreement, nor did the individual contracts contemplate any prospective bargaining agreements which might apply to Respondents. Petitioners' statement to the contrary on page 2 of their Petition does not reflect the terms of Repondents' contracts as set forth in the complaint (App. A-42—A-49). The terms of the employment contracts rising between Respondents and Caterpillar while Respondents were employed as managers or weekly salaried employees did not mention bargaining agreements or bargaining unit work. Subsequently, after entering into individual employment contracts with Caterpillar, Respondents were downgraded to bargaining unit jobs and terminated as part of the closing of the San Leandro facility in 1985.

The Court of Appeals held that because the complaint was based solely on individual contracts of employment entered into between Respondents and Caterpillar while Respondents were holding non-union jobs, a federal cause of action was not stated in the complaint. The Ninth Circuit held that in order for the complaint to be preempted by section 301 and subject to removal, complete preemption had to exist, requiring both that federal law replace the state cause of action and provide an alternative remedy. The Court of Appeals stated that because the complaint was based on individual contracts entered into while Respondents occupied non-bargaining unit positions, complete preemption did not exist since section 301 does not cover employment contracts

made outside of the collective bargaining process by employees holding non-bargaining unit jobs. Thus, the Court of Appeals reasoned, the argument that the individual contracts were superseded by, and merged into the bargaining agreement, amounted to a defensive allegation as the agreement was "not a necessary element of their [Respondents] affirmative cause of action." (App. A-16). Therefore, the action was not removable.

REASONS NOT TO GRANT THE WRIT

I

THE DECISION DOES NOT CONFLICT WITH ANY OTHER DECISION OF THIS COURT OR COURT OF APPEALS AS TO REMOVABILITY

In order to create the appearance of conflict with decisions of this Court, Petitioners' brief artfully treats this case as if it decided both removal and preemption issues. It did not. The precise holding of the Court of Appeals appears as follows:

> We reverse on the ground that the action was improperly removed from state court and hold that the district court lacked jurisdiction to address the merits of the preemption defense or to dismiss the action." (App. A-2)

The Court of Appeals made clear that it was not deciding the preemption question (App. A-16). Petitioners' contention, therefore, that the decision of the Ninth Circuit conflicts with this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985) fails because Petitioners' argument improperly mixes the preemption holding of *Lueck* with the removability question addressed in this case. They are separate issues.

In *Lueck*, this Court decided that the highest court of the State of Wisconsin erred when it held that a suit based upon a violation of a provision of the bargaining agreement was not preempted by section 301. The *Lueck* case was never the subject of removal and neither the state court or this Court had occasion to address the question of whether the case could have been removed. *Lueck* involved only the validity of a preemption defense and, unlike this case, did not resolve the separate question of whether a federal

court would have jurisdiction under section 301 to hear the case if the complaint had been removed. (App. A-15, 16)

Petitioners argue at length, citing *Lueck*, that the Ninth Circuit's opinion is wrong because Respondents' claims are substantially dependent upon analysis of the terms of a bargaining agreement and must thus be treated as section 301 claims or dismissed as preempted. *Lueck*, 471 U.S. at 210-211. "Accordingly, the complaint was removable." Pet. at 7-8. Nowhere is Caterpillar's confusion of the preemption and removability issues more apparent. The cited language from *Lueck* directs state courts as to how to treat a state claim rising from a bargaining agreement, that is, either to treat the claim under section 301 or dismiss it as preempted. This analysis does not provide a basis for removability in a case involving allegations of breach of contract entered into by non-bargaining unit employees. Nor, as pointed out by the Ninth Circuit, does the possibility of a preemption defense to these contracts make this case removable. (App. A-7, A-16).

In addition, *Lueck* restricted the preemptive force of section 301 only to those suits based on "state law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties." 105 S. Ct. at 1912. Where, as here, the bargaining agreement does not provide the protection sought by Respondents through state contract and tort law, there is no basis for finding preemption and removal jurisdiction because federal law does not provide Respondents with any remedy. *Harper v. San Diego Transit*, 764 F.2d 663, 667-69 (9th Cir. 1985). In that circumstance the Court lacks "arising under" jurisdiction under section 301 and Respondents' claims are not properly removable.

Nor have Petitioners identified any other decision of this Court or any decision of another Circuit with which the Court of Appeal's ruling conflicts.[1] In addition to *Lueck*, Petitioners do argue, however, that the Court of Appeal's decision conflicts with

[1] Petitioners' claims that the decision conflicts with other cases in the Ninth Circuit is not an appropriate basis for granting the Petition, Rule 17.1(a), Rules of the Supreme Court of the United States; by denying Petitioners' requests for an *en banc* hearing the Ninth Circuit has implicitly rejected that contention.

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) and *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984), *cert. denied*, 83 L.Ed.2d 359 (1984).

Franchise Tax Board held that there was no basis for removal jurisdiction where an action by state officials to execute a levy for unpaid taxes on a benefit plan fund covered by ERISA was removed on the grounds that the state cause of action was preempted because it interfered with that statute. The Court ruled the preemption allegation was defensive and therefore did not provide a basis for removal.[2] The Court of Appeal's ruling carefully tracks *Franchise Tax Board*[3] and concludes as well that preemption is a defensive allegation. Petitioners' assertion that the Ninth Circuit's decision conflicts with *Franchise Tax Board* is based on the faulty premise, discussed above, that *Leuck* requires a finding on the merits that Respondents' claims are preempted by section 301 and therefore removable. Since *Leuck* does not transform Petitioners' defensive allegation of preemption into a necessary ingredient of Respondents' state cause of action, the

[2] The Petition quotes language in *Franchise Tax Board* referring to section 301 "complete preemption" found in *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968). But *Avco* involved an employer's action against a union for an injunction to enjoin a strike in violation of a no-strike clause in a collective bargaining agreement, an action clearly falling within the scope of section 301 and invoking federal removal jurisdiction. Petitioners, not surprisingly, do not directly cite *Avco* as a conflicting case. Nor do Petitioners refer to *Franchise Tax Board's* statement that:

> But even under Section 301 we have never intimated that any action merely relating to a contract within the coverage of Section 301 arises exclusively under that section. 463 U.S. 1, 25 n.28.

[3] Unlike, as the Court of Appeals noted (App. A-10, A-11), its earlier decisions in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984) *cert. denied*, 105 S. Ct. 2319 (1985) and *Aragon v. Federated Dept. Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 229 (1985), which fail to address the question of jurisdiction before deciding the preemption issue.

Court of Appeals correctly applied *Franchise Tax Board* in concluding that the doctrine of "preemption removal" did not provide federal removal jurisdiction.

The second case utilized by Petitioners to establish conflict, *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984) also does not directly conflict with the result reached by the Court of Appeals. Unlike Respondents, Eitmann was *always* employed by defendant in a position within the collective bargaining unit. Petitioners err, therefore, when they claim that "the material facts of the instant case are no different." Pet. at 16. Moreover, the labor agreement in *Eitmann* provided that the employer had the right "to dispense with the services of any employee" except "in the case of discharge for cause." 730 F.2d at 361. Further, plaintiff sought only reinstatement, a remedy normally available only under collective bargaining. *Id.* at 361 n. 1. No doubt the Court also was struck by the artful manner in which Eitmann tried to utilize the state court to seek a remedy cognizable under the grievance proceeding of the bargaining agreement, after he had abandoned the grievance mechanism following denial of his grievance.

II

GRANTING CERTIORARI WOULD DEPRIVE RESPONDENTS OF THEIR RIGHT TO HAVE THE STATE COURT DECIDE THEIR CLAIMS; RISK RESOLVING THE PREEMPTION ISSUE PREMATURELY AND DANGEROUSLY EXTEND THE SCOPE OF SECTION 301

The Court of Appeal's decision gives proper weight to the legitimate role of the state courts in interpreting and applying state law, including cases which may raise questions of federal labor law. Petitioners' claim that the decision interferes with the "federal regulatory scheme" is, in actuality, a plea to this Court to expand dramatically the role of federal preemption so that Petitioners may defend this case in the forum of their choosing. Should Petitioners have their way, a drastic impact on the state courts, federal removal jurisdiction and section 301 will result.

First, a basic theme of the Petition rises from Petitioners' assertion that because the collective bargaining agreement relates to Respondents' claims, a federal question is presented and therefore Petitioners have a right to have their preemption defense decided in federal court. Pet. 6, 19. As Respondents concede, Pet. 19, however, and *Lueck* illustrates, state courts have concurrent jurisdiction over section 301 actions. *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). *Lueck* provides an example of the obvious role state courts have in deciding questions of federal labor law. If, as in *Lueck,* a state court erroneously applies state law rather than principles of federal labor law, Supreme Court review lies to correct error. Petitioners obviously are mistaken when they assert that a denial of removal will prevent federal appellate review of these questions. Pet. 19.

Petitioners blandly assert that the Court should not allow a plaintiff to use artful pleading to close off defendants' right to a federal forum. No mention is made of Petitioners' desire to use artful pleading of the defensive allegation of preemption to close off Respondents' right to have their contract claims decided in a state forum. Petitioners offer a "parade of horribles" consisting of various claims which will not be removable if the Ninth Circuit's decision is allowed to stand. Assuming that they are correct in their contentions, Petitioners' argument is based on the assumption that state courts are not competent to resolve claims involving potential questions of federal labor law. That assumption is contrary to the notion of concurrent jurisdiction over section 301 cases and the limits of federal jurisdiction and the removal statute. Congress has limited removal jurisdiction to cases raising a federal question in the complaint. Respondents should not be deprived of their choice of forum merely to accomodate Petitioners' strategy to have the merits of their defensive allegation of preemption decided in federal court.

If the Court declines to hear this case, it will return to state court. When that happens, Petitioners' preemption defense presumably will be decided on its merits. After that issue has wound itself through the state courts, the preemption issue will then be ripe for consideration by this Court as it was in *Lueck, supra,* and *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983). Petitioners' desire to

have this question decided now, in the context of removability, is premature and in derogation of basic concepts of state court responsibility in a federal system. The function of the removability statute is not to foreclose the right of the state courts to address state claims merely because one of several defenses relies on the doctrine of federal preemption.

Unlike *Lueck* and *Belknap*, the preemption issue has not yet been decided by the state courts. Allowing the state courts to resolve the question of whether the state claims are preempted by federal law acknowledges the proper role of the state courts by giving them the initial opportunity to resolve this question. In addition, it avoids premature resolution of the preemption issue without a complete record, including, for example, evidence as to whether either Caterpillar or the union made any effort to negotiate into any labor agreement the rights which Respondents acquired while they were holding non-union jobs with Caterpillar. Until the preemption issue is decided by the California courts, this case lacks finality.[4] *cf. Belknap*, 463 U.S. at 497 n. 5.

Second, if all the concerns listed on page 18 of the Petition, as well as the unusual facts found in this case, provide a basis for "preemption removal" under section 301, the scope of section 301 will broaden dramatically with corresponding burdens in compliance with that statute on employers and unions. If "arising under" jurisdiction generates from all of these situations, unions and employers will be required to answer for their actions or lack thereof in these situations in response to complaints filed by disgruntled employees under section 301 under the authority of *Vaca v. Sipes*, 386 U.S. 171 (1967). If section 301 is interpreted as used by Petitioners, unions will be obligated by the duty of fair representation to investigate, determine and negotiate on behalf of

[4] Presently pending before the California Supreme Court are three cases raising the question of whether state claims are preempted by federal labor law. *De Tomaso v. Pan American World Airways,* 174 Cal.App.3d 1023 (1985), review granted LA 32150: *Friday v. Hughes Aircraft Co.,* 179 Cal.App.3d 947 (1986), review granted LA 32219; *Alpha Beta Corp. v. Superior Court,* 180 Cal.App.3d 324 (1986), review granted SF 25039.

potential members of the bargaining unit all of the pre-unit promises contended by Petitioners to fall within section 301. While not mentioned by Petitioners, the consequences of Petitioners' arguments would impose great hardships upon unions and employers which should not be ignored.

Third, on the final page of the Petition, Pet. 21, Petitioners state that the Court should review this case because it contains issues "almost identical" to those presented in *General Motors Corp. and Metropolitan Life Ins. Co. v. Taylor,* (Case Nos. 85-686, 85-688, Court of Appeals decision 763 F.2d 216) where certiorari has been granted. *Taylor* raises questions of removability and preemption under ERISA's "virtually unique pre-emption provision," *Franchise Tax Board*, 463 U.S. at 24 n.26. It is undisputed that the benefits plan at issue in *Taylor* "is regulated by ERISA [and] ERISA preempts all state laws in this field." 763 F.2d at 218. In contrast, the claims in the instant case were negotiated at a time in Respondents' employment with Caterpillar when Respondents were not subject to the provisions of section 301. Of course, unlike ERISA, section 301 contains no statutory provision preempting state law as does ERISA, 29 U.S.C. Section 1144. In addition, as acknowledged by *Taylor*, there is a "definite split of authority" on the removability and preemption issues presented by *Taylor*. 763 F.2d at 219. That basis for granting certiorari does not exist in the instant case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: October 23, 1986

Respectfully submitted,

McCARTIN & WOLLETT

By: FRITZ WOLLETT
Attorneys for Respondents
Cecil Williams, Clyde Ward, Frederick Walker, Robert A. Van Buren, Clark A. Torres, John Tennant, James Payton, James Moretti, Andrew Horvath, Richard L. Gonzales, Willie Crum, Pete Carnute, and Joel Bryan

REPLY

BRIEF

Supreme Court, U.S.
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No. 86-526

In The
Supreme Court of the United States
October Term, 1986

Caterpillar Inc., Robert Gilmore, Don Fowler, Jeffrey Glickman, A.E. Mathisen, Keith Wheeler,

Petitioners,

vs.

Cecil Williams, Clyde Ward, Frederick Walker, Robert A. Van Buren, Clark A. Torres, John Tennant, James Payton, Clarence Northern, James Moretti, Richard Kanuse, Andrew Horvath, Lee Green, Richard L. Gonzales, Willie Crum, Pete Carnute and Joel Bryan,

Respondents.

REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GARY P. SCHOLICK
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108
Telephone: (415) 433-1940

Attorneys for Petitioners Caterpillar Inc., Robert Gilmore, Don Fowler, Jeffrey Glickman, A.E. Mathisen, and Keith Wheeler

November 3, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Respondent Williams' ("Williams") statement that his "independent contract" does not relate to, contemplate or mention the collective bargaining agreement or bargaining unit work is nonsense. The essence of his complaint is a pre-unit implied promise that he would not be discharged so long as he performed his work satisfactorily, and that his discharge from the bargaining unit was wrongful because he performed his bargaining unit work satisfactorily (A-48-A-50, ¶¶ 28, 29, 32, 33). His alleged independent contract, therefore, directly relates to, contemplates and impacts upon the collective bargaining agreement and the bargaining unit job from which he was discharged. If, as Williams now claims, his independent contract did not relate to or mention bargaining unit work, then why is he pressing a lawsuit alleging that his bargaining unit discharge was wrongful? His statement is a classic illustration of artful pleading and why this case arises under section 301: Williams contends that his state law contract does not relate to a collective bargaining agreement or bargaining unit work, yet he seeks to enforce his state law contract with respect to a discharge from a bargaining unit job covered by a collective bargaining agreement.

2. The fundamental issue raised by this complaint is whether a bargaining unit employee was properly discharged from his bargaining unit job despite his claim that he was satisfactorily performing his bargaining unit work. This issue does not "merely [relate] to a contract within the coverage of § 301" or raise an "attenuated" issue of section 301 jurisdiction. *Franchise Tax Board v.*

Laborers Vac. Trust, 463 U.S. 1, 25, 28 (1983). The complaint affirmatively attacks the legal effect of the collective bargaining agreement. Because of Williams' contentions that his pre-existing contract survived his entry into the bargaining unit, that it existed on the day of his discharge from the bargaining unit, and that it controlled the question of whether his discharge from the bargaining unit was wrongful, notwithstanding a collective bargaining agreement which directly addressed the issue of discharge and which admittedly covered Williams' employment, a court will be required to focus on the collective bargaining agreement, to interpret the terms of the collective bargaining agreement,[1] and to apply the *J.I. Case* principle that all individual promises inconsistent with a collective bargaining agreement are extinguished. Williams' lawsuit, therefore, will be dependent upon the provisions of a collective bargaining agreement, and his complaint, therefore, "must . . . be treated as a § 301 claim." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Under *Franchise Tax Board*, such a complaint is removable.

3. The Court of Appeals held that removal was not proper because "complete preemption" under section 301 did not exist (A-7, A-17-A-18). The decision below thus addressed not merely removal, but also the impact of preemption on removal jurisdiction. Respondents' contention to the contrary is meritless. The Court of Appeals' decision thus conflicts with decisions of this Court and other Courts of Appeals because of its holding that even when

---

[1] Williams himself concedes that his state law claims involve rights and obligations which were negotiable under the labor agreement, and that evidence on such negotiations would be relevant in his action. Brief In Opposition, pp. 4, 8.

the resolution of a state claim requires reference to and the interpretation of a collective bargaining agreement, complete preemption does not exist. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 220; *Franchise Tax Board v. Laborers Vac. Trust*, 463 U.S. 1 (1983); *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986); *Bale v. General Telephone Co. of California*, 795 F.2d 775, 776, 779 (9th Cir. 1986); *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 345 (7th Cir. 1985); *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 361-63 (5th Cir. 1984), *cert. denied* 83 L.Ed.2d 359 (1984).

Most recently, in *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589,[2] the Sixth Circuit found that removal jurisdiction exists under section 301, i.e., that "complete preemption" exists, whenever an employee's state law claim requires reference to a collective bargaining agreement, and not, as the court below effectively found, only when an employee's claim can be successfully pursued under a collective bargaining agreement. 795 F.2d at 590-591. In *Maushund*, the Court concluded that state law claims based on alleged independent individual agreements, like those asserted in this case, simply have "no application to employment relationships which are subject to a collective bargaining agreement." 795 F.2d at 591. Such claims were properly removed because, like Williams' claims herein, "[the employee] must look to federal labor law for any relief and that his sole remedy, *if any*, lies not in state law but in the terms of the collective bargaining agreement." 795 F.2d at 590 (emphasis added). Sig-

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[2] This case was not reported until after Caterpillar filed its Petition For Writ of Certiorari.

nificantly, the employee in *Maushund* was a "casual employee" who asserted that he had little or no rights under the labor contract, that any attempt to pursue arbitration would be futile, and that, therefore, "his employment status is outside the coverage and protection of the collective bargaining agreement." 795 F.2d at 590. Here, the court below applied similar arguments to conclude that complete preemption did not exist, and that removal was therefore improper. Unlike the Ninth Circuit, however, the Sixth Circuit had no difficulty concluding that the employee's alleged "independent contract" was removable because "[t]he collective bargaining process prohibits [the employee] from engaging in separate negotiations with the company and precludes any actions to enforce such an agreement." 795 F.2d at 590.

The only possible difference between the decision below and *Maushund* is that the court in *Maushund* made no reference to whether the state law independent agreement was pre-existing or co-existing with the collective bargaining agreement. This distinction is immaterial, however, because Respondents herein allege that at the time of discharge, the two contracts were co-existing. As explained in *Maushund*, the critical inquiry is whether an employee is seeking to enforce a state law contract when the "employment relationship . . . [is] subject to a collective bargaining agreement." 795 F.2d at 590. Where it is, as in *Maushund* and in this case, the claim is completely preempted and removable to federal court. 795 F.2d at 591; *Oglesby v. RCA Corp.*, 752 F.2d 272, 276 (7th Cir. 1985); *Eitmann v. New Orleans Public Service, Inc.* 730 F.2d at 365.

4. Williams' half-hearted attempt to distinguish *Eitmann* is unavailing. None of the distinctions cited by Williams was critical to the Fifth Circuit's holding that pre-existing independent contracts are subsumed in later negotiated collective bargaining agreements, thus providing a basis for removal jurisdiction.

5. *Metropolitan Life Insurance Co. v. Taylor,* 763 F.2d 216 (6th Cir. 1985), *cert. granted,* 106 S. Ct. 1182 (1986) (Nos. 85-686 and 85-688) raises issues directly relevant to this case. Both the parties and the Court in *Taylor* cited cases and authorities which turned on the scope of section 301 and the removability of cases arising under section 301. 763 F.2d at 220. The applicability of such cases and authorities to ERISA lawsuits has also been a critical area of discussion in the parties' briefs to this Court. *See, e.g.,* Brief For Petitioners General Motors Corporation and Metropolitan Life Insurance Company, pp. 23-26, filed May 2, 1986, Case Nos. 85-686 and 85-688. Moreover, *Franchise Tax Board,* also an ERISA case, extensively discussed and relied upon cases arising under section 301 in deciding whether or not removal was proper under ERISA. 463 U.S. at 22-26. It is therefore likely that this Court's decision in *Taylor* will address the extent to which section 301 actions are analogous to ERISA actions for the purposes of determining removal jurisdiction. This Petition, however, presents an even more compelling case for certiorari in view of the Court's suggestion in *Franchise Tax Board* that section 301 preemption is broader than the "virtually unique [ERISA] preemption provision." 463 U.S. at 23, 24, n.26.

If certiorari is not granted in this case, an entire body of section 301 lawsuits will not be heard in federal

district courts, i.e., any action in which an employee covered by a collective bargaining agreement contends that he entered into a pre-existing individual contract. Thus, if an employee works as a non-union clerk for one day and is transferred to a union position the next day, his or her lawsuit for wrongful discharge from the union position will not be removable even if the employee worked in the union position for the next 40 years. In light of the importance which Congress and this Court have attached to a uniform and predictable federal common law, it is virtually inconceivable that Congress intended that a plaintiff should be entitled to litigate this preemption question in state court and not give defendants the option to remove such complaints to federal court.

Unless removal is permitted in cases alleging pre-existing state law contracts, this Court will be the first and only federal appellate court to hear such cases. This is a burden that neither the Court nor the parties should bear. Respondents note that three cases are presently pending before the California Supreme Court raising the issue of section 301 preemption. The tortuous procedural history of those cases is by no means a persuasive argument in favor of the state court's ability to apply a uniform and predictable federal common law. *See, e.g., Alpha Beta, Inc. v. Superior Court,* 180 Cal. App. 3d 324, 327, 332-33, n.1, 334, 225 Cal. Rptr. 551, 552-54, 557, n.1 (1986) (the employer's third request for hearing by the California Supreme Court has been granted: Case No. SF 25039).

———o———

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition For A Writ Of Certiorari, the petition for writ of certiorari should be granted.

DATED: November 3, 1986.

Respectfully submitted,

GARY P. SCHOLICK
LITTLER, MENDELSON, FASTIFF
& TICHY
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108
Telephone: (415) 433-1940

Attorneys for Petitioners
Caterpillar Inc., Robert Gilmore,
Don Fowler, Jeffrey Glickman,
A.E. Mathisen, and Keith Wheeler

AMICUS CURIAE

BRIEF

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No. 86-526

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, KEITH WHEELER,
Petitioners,

VS.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE, and JOEL BRYAN,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES G. BAKALY, JR.
(*Counsel of Record*)
DEBRA L. BOYD
F. CURT KIRSCHNER, JR.

O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Amicus Curiae, Merchants and Manufacturers Association

Bowne of Los Angeles, Inc., Law Printers. (213) BOWNE CO

29pp

No. 86-526

In the Supreme Court

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OCTOBER TERM, 1986

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MERCHANTS AND MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Merchants and Manufacturers Association (the "Association") moves the Court for leave to file the attached brief of amicus curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

I

NATURE OF THE INTEREST OF THE MERCHANTS AND MANUFACTURERS ASSOCIATION

The Association is a non-profit California corporation. Its purpose is to augment the human resources management of member firms. Over 2,600 companies of varying sizes and industries are members of the Association. The members collectively employ over one million employees.

Many of the Association's members are parties to collective bargaining agreements with labor unions. It is crucial to the Association's members that courts preserve established federal labor law policy which mandates that terms and conditions of employment can be negotiated only by the chosen union's representative in the collective bargaining process and that disputes such as respondents' be resolved through the arbitration and grievance procedures agreed to by the parties to the collective bargaining agreement. It is equally important to the members of the Association that clear and uniform federal law be applied to interpret and enforce collective bargaining agreements.

II

ISSUES TO BE ADDRESSED BY THE ASSOCIATION

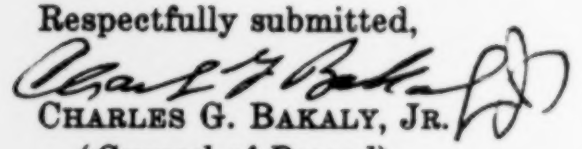
The decision below bears significantly on all of the above precepts of federal labor policy. The legitimacy of that decision turns on an employee's power to circumvent the terms set forth in a collective bargaining agreement and to negotiate and retain the benefit of individual agreements.

The Association submits that its experience in labor related matters, including its appearance as amicus curiae in pertinent forums, gives it the unique ability to focus on the long term impact of the decision below on federal labor policy. In addition, the Association is able to develop more fully the consequences of the lower court's decision on a multifarious group of employers, some of whom are unionized and some of whom are currently unorganized but may contemplate unionization in the future.

For the foregoing reasons, the Court should grant this Motion for Leave to File Brief of Amicus Curiae in Support of the Petition for Writ of Certiorari.

Dated: October 24, 1986.

Respectfully submitted,



CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
F. CURT KIRSCHNER, JR.
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000
Attorneys for Amicus Curiae, Merchants and Manufacturers Association

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No. 86-526

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, KEITH WHEELER,
Petitioners,

vs.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE, and JOEL BRYAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DESCRIPTION OF INTEREST OF AMICUS CURIAE

The Merchants and Manufacturers Association ("the Association") adopts the statements made in the Motion for Leave to File Brief, immediately preceding this brief, as the description of the interest of amicus curiae.

In addition, the Association submits that the decision below poses a fundamental threat to several important precepts of federal labor policy: in particular, the exclusive role of the selected union to negotiate terms of employment for represented employees, the exclusive nature of grievance and arbitration procedures to settle employment disputes for bargaining unit employees and the importance of applying clear and uniform federal law to interpret and enforce collective bargaining agreements.

The court below held that state causes of action for wrongful termination, brought by union employees who were discharged from their bargaining unit positions after a plant shutdown, were not claims arising under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"). In a decision at odds with this Court's case authority and the law of other federal circuit courts, the court below determined that, on the face of respondents' complaint, the purported individual employment agreements had an existence independent of a subsequent collective bargaining agreement and, therefore, for removal purposes, could not be construed as Section 301 claims for breach of a collective bargaining agreement. The court below held that the complaint did not invoke federal jurisdiction and that, therefore, the action was not removable.

As set forth in the Petition for Writ of Certiorari, the resolution of respondents' claims depends on an interpretation of the labor contract which governed terms and conditions of respondents' employment at the time of

their discharge. The opportunity to remove state law causes of action which depend, for their resolution, on an interpretation of a collective bargaining agreement, is of vital importance to employers and unions alike. Since the enactment of federal statutes governing labor relations, the federal courts have developed considerable expertise in interpreting and applying these statutory labor provisions and have developed a body of federal common law with respect to labor relations in accordance with the Congressional mandate that federal labor law be uniform in substance and consistent in application. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-10, 105 S. Ct. 1904, 1910 (1985); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

The decision below jeopardizes the continued uniformity and consistency in the application and interpretation of federal labor law. If the decision stands, an entire area of labor law will be effectively severed from the unique labor law expertise of the federal courts and, instead, will be subject to the inevitably inconsistent interpretations of some fifty jurisdictions. Because the decision below has a pervasive impact on employers, employees and labor unions nationwide, the Association urges this Court to grant certiorari in this matter.

CONSENT OF PARTIES

Respondents to this action refused consent to the filing of this brief by the Association. A motion for leave to file this brief is attached. Petitioners have consented to the filing of this brief and their written consent will be filed concurrently.

STATEMENT OF THE CASE

The Association respectfully adopts the Statement of the Case set forth in the Petition for Writ of Certiorari, as well as Petitioners' description of the Opinions Below, Jurisdiction, Statutory Provisions and the Question Presented.

ARGUMENT

I

THIS COURT'S REVIEW IS NEEDED TO RESOLVE THE CONFLICT REGARDING THE SCOPE OF REMOVAL JURISDICTION PURSUANT TO 28 U.S.C. § 1441(b)

A. The Complaint Stated An "Artfully Pleaded" Section 301 Claim

Section 301 confers original jurisdiction upon the federal district courts over "[s]uits for violation of contracts betweeen an employer and a labor organization representing employees in an industry affecting commerce . . . ." The courts have consistently held that under this statute, an individual employee's complaint which alleges wrongful discharge in breach of a collective bargaining agreement is removable under 28 U.S.C. § 1441 ("Section 1441") on the basis of the jurisdictional grant of Section 301, regardless of whether a specific reference to Section 301 or to a collective bargaining agreement is made in the complaint. *See, e.g., Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557 (1968); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212-13 (9th Cir. 1980).

While respondents' complaint attempted to defeat federal jurisdiction by omitting reference to Section 301 or the collective bargaining agreement, under the artful

pleading rule, federal courts look beyond the language of the complaint to determine the true nature of the complaint. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) ("courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.' ") (quoting 14 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3722, at 564-66 (1976)).

More recently, this Court reaffirmed the artful pleading doctrine in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), noting that the rule has particular application in cases in which union employees attempt to avoid the application of federal law (or removal to a federal forum) by asserting tort and contract claims ostensibly grounded in state law:

> "Although we have often repeated that 'the party who brings a suit is master to decide what law he will rely upon' (citation omitted), it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint, see *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*, 376 F.2d 337, 339-340 (CA6 1967), aff'd, 390 U.S. 557 (1968)." *Id.* at 22.

Because a purported state law claim by a union employee "raises the spectre of 'artful pleading', the court must necessarily be guided by the substance rather than the form of the complaint." *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 366 (5th Cir.), *cert. denied*, 105 S. Ct. 433 (1984). *Accord Oglesby v. RCA Corp.*, 752 F.2d 272, 276-78 (7th Cir. 1985); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1471-72 (9th Cir. 1984); *Schroeder v. Trans World Airlines,*

Inc., 702 F.2d 189, 191 (9th Cir. 1983) (proper to consider removal petition to determine true nature of plaintiff's claims).

The court below refused even to consider whether respondents' causes of action were "artfully pleaded" Section 301 claims. Instead, it found petitioners' arguments that the "individual agreements" merged into the collective bargaining agreement to be purely a defensive allegation.

The court below placed particular reliance on *Hunter v. United Van Lines*, 746 F.2d 635 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 180 (1985), and *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984), as supportive of its adherence to the well-pleaded complaint rule. Neither *Hunter* nor *Carpenters* is a labor law case, and the court's reliance on those cases ignored the distinctive preemptive force of Section 301.

In *Franchise Tax Board*, this Court distinguished the case before it — an ERISA action removed on the basis of ERISA preemption of state claims — from *Avco Corp. v. Aero Lodge No. 735*. In *Avco*, the employer filed suit in state court to enjoin a union strike commenced in violation of a contract with the union. No reference was made to a collective bargaining agreement or to Section 301. This Court determined that the action "arose under" Section 301 and was removable. 390 U.S. at 560. In *Franchise Tax Board* the Court noted:

> "The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that

> state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a *federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."* 463 U.S. at 23-24 (emphasis added).

Since the *Franchise Tax Board* decision, the unique stature of federal labor law preemption and its relationship to the artful pleading doctrine has been noted by several other circuit courts. *See, e.g., Oglesby v. RCA Corp.*, 752 F.2d at 276; *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d at 366. The Ninth Circuit itself has recognized that Section 301 supplements federal question jurisdiction pursuant to 28 U.S.C. § 1337, that Section 301 " 'displace[s] entirely any cause of action "for violation of contracts between an employer and a labor organization" ' ", that such suits are governed exclusively by federal law and that, accordingly, such suits give rise to the "artful pleading doctrine." *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d at 1472 (quoting *Franchise Tax Board*, 463 U.S. at 23).

The refusal of the court below to apply the artful pleading doctrine and the court's concomitant ruling that the complaint does not invoke the collective bargaining agreement ignore the fundamental meaning and effect of the "merger doctrine" set forth in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) and its progeny. Petitioners' argument that individual agreements "merge" and are subsumed into the collective bargaining agreement is not a "defensive" allegation as suggested by the court below, but, in fact, establishes the true substance and nature of respondents' complaint, on which any determination of original jurisdiction must be based. *Franchise Tax Board*, 463 U.S. at 22-23; *Avco*, 390 U.S. at 560.

When contracts "merge" they become *one contract* — i.e., the collective bargaining agreement. "[A]ny independent agreement of employment could be effective *only as part of the collective bargaining agreement.*" *Olguin,* 740 F.2d at 1474 (emphasis added). Similarly, to the extent the alleged promises to respondents in this case represent industry practices, "such practices are *part and parcel of the collective bargaining agreement and subject to its terms.* . . ." *Eitmann,* 730 F.2d at 363 (emphasis added) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581-82 (1960)). *See also Manning v. Bouton,* 678 F.2d 13 (3rd Cir. 1982); *Lewellyn v. Fleming,* 154 F.2d 211 (10th Cir.), *cert. denied,* 329 U.S. 715 (1946). When the terms of individual agreements conflict with the terms of the collective bargaining agreement, the latter, of course, prevail. *J.I. Case Co.,* 321 U.S. at 337. On the other hand, the collective bargaining agreement may, in some circumstances, provide expressly for certain areas subject to individual bargaining. *Id.* at 338. Whether the individual terms survive or are preempted, the end result is the same: the only remaining contract in *any* case is the collective bargaining agreement.

Thus, although respondents seek recovery for breach of "surviving" independent agreements, these agreements, if indeed they survived the collective bargaining agreement, are "part and parcel" of the labor contract. A necessary result is that a cause of action based on "independent" individual promises is actionable, if at all, *only* as an action for breach of the collective bargaining agreement pursuant to Section 301. Whether any of the alleged individual agreements survives is solely a function of the collective bargaining agreement and wholly dependent on an analysis of its language and bargaining history. The merger doctrine, then, is not a "defensive" allegation, as suggested by the court below, but a fundamental and

necessary tool to determine the true nature of respondents' complaint — a suit arising under Section 301.

B. The Decision Below Conflicts With Decisions of This Court, Decisions of Other Circuit Courts of Appeals and Other Decisions of the Ninth Circuit Court of Appeals

In *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 105 S. Ct. 1904 (1985), this Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim *must either be treated as a § 301 claim* (citation omitted), or dismissed as preempted by federal labor-contract law." 471 U.S. at 220, 105 S. Ct. at 1916 (emphasis added). Although *Allis-Chalmers* is not a removal case, nonetheless, it is clear that an action which "must be treated as a § 301 claim" arises under federal law and is removable under 28 U.S.C. § 1441(b).

The court below, however, found that respondents' complaint neither implicated the collective bargaining agreement nor stated a claim subject to federal remedy. Both determinations are at fundamental odds with the principles set forth in *Avco, Allis-Chalmers* and *Franchise Tax Board* and directly conflict with decisions in the other circuit courts of appeals and another panel of the Ninth Circuit.

The court below acknowledged that at least "some" reference to the collective bargaining agreement might be required to resolve respondents' ostensible state law claims based on their assertions of "independent" and "individual" employment agreements. Yet the court concluded that the level of federal law involvement in this case was insufficient to transform the case into one "arising under" Section 301.

As other circuit courts have determined, however, whether individual employment agreements survive a collective bargaining agreement is *wholly* a matter of federal concern. In *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied,* 105 S. Ct. 433 (1984), the plaintiff, like respondents, brought an action in state court for damages for breach of an individual employment contract for "lifetime employment" allegedly entered into before he was hired by defendant employer and before the terms of his employment became covered by a collective bargaining agreement. The defendant employer removed the action and was granted its motion for summary judgment.

The Fifth Circuit upheld removal, although the complaint on its face did not refer to a collective bargaining agreement. Relying on *J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944) and *NLRB v. Allis-Chalmers Manufacturing Co.,* 388 U.S. 175 (1967), the Fifth Circuit determined that as a matter of substantive federal law, the plaintiff's alleged "independent" contract for lifetime employment was subsumed into and preempted by the collective bargaining agreement because it sought "to 'limit or condition' the terms of the collective bargaining agreement, which established the terms and conditions of employment, including discharge." *Id.* at 363. (quoting *J.I. Case Co. v. NLRB,* 321 U.S. at 337.) The *Eitmann* court noted that although defendant's preemption argument *appeared* to be only a defensive allegation, *Avco* and *Franchise Tax Board* established that the powerful preemptive effect of Section 301 displaced any "artfully pleaded" state law claims:

> "[W]e hold that, where a state cause of action is preempted by section 301, the federal courts have original subject matter jurisdiction over the action despite the absence of a federal claim on the face of the complaint. In such a case, which raises the spectre of 'artful pleading,' the court must necessarily be guided by the substance rather than the form of the complaint." *Id.* at 366.

The *Eitmann* court determined that the action "arose under" Section 301 and therefore the court had original subject matter jurisdiction over the matter. *Id.* at 365-66.

The instant case is also in conflict with a decision of another Ninth Circuit panel, which determined that original federal jurisdiction is stated when a collective bargaining unit employee sues for wrongful discharge based on a breach of an ostensibly "independent" individual employment agreement. *See Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984).

In *Olguin*, a union employee alleged that the employer had breached progressive discipline provisions contained in the employer's personnel manual. *Id.* at 1474. Although the complaint made no reference to the collective bargaining agreement, the Ninth Circuit determined that any contractual rights claimed under state law were preempted by the labor contract, that "outside" agreements could only be effective if made part of the collective bargaining agreement and that, accordingly, plaintiff's complaint for wrongful discharge was properly recharacterized as a Section 301 suit, over which the court had original subject matter jurisdiction. *Id.* at 1474-75.

In the decision below, the Ninth Circuit identified several features which ostensibly distinguished the instant case from *Olguin*.[1] None of these attempts to distinguish the two cases withstands scrutiny, however, and the decision below is in conflict with both *Olguin* and *Eitmann*.

---

[1]The court below ignored *Eitmann* entirely.

First, the court below suggested that *Olguin* was distinguishable because the plaintiff in that case entered into or was already in the collective bargaining unit at the same time his "independent" agreement (based on the employer's personnel manual) arose, *i.e.*, his alleged individual agreement was co-existing and not pre-existing as allegedly it is in the instant matter. However, nowhere in the *Olguin* decision does the court attribute significance to the "timing" of the independent agreement. Nor has this Court distinguished between independent contracts which are pre-existing, co-existing or entered into after the collective bargaining agreement. *See, e.g., J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (pre-existing individual employment agreements do not override terms of collective bargaining agreement).

Other circuits do not make such a distinction. Each of the plaintiffs in *Eitmann, Lewellyn* and *Manning* alleged that he had individual contractual rights which had vested *prior* to coverage by the collective bargaining agreement. In each case the effect was the same: the courts determined that the individual contracts merged into the collective bargaining agreement and, to the extent their terms conflicted with the terms of the labor contract, were preempted.

The status of the employee when the alleged individual promises are made has no significance.[2] The significant

[2]The fact that respondents entered into the alleged employment agreement while in "management positions" does not make those agreements sacrosanct and immune from the collective bargaining process. Supervisors and managers often are covered by collective bargaining agreements in a number of industries, such as construction, retail food, and entertainment. *See Nassau and Suffolk Contractors' Ass'n, Inc.,* 118 N.L.R.B. 174, 180-81 (1957). In addition, supervisors may be covered by a collective bargaining agreement upon the consent of the employer. *Florida Power & Light Co. v. International Bhd. of Electrical Workers,* 417 U.S. 790, 813 (1974). Moreover, managers may engage in collective activities even though their activities are not protected under the National Labor Relations Act. *Corporate Printing Co. v. New York Typographical Union No. 6.,* 555 F.2d 18, 21-22 (2d Cir. 1977). Regardless of the status of an employee, an individual agreement which is inconsistent with the terms of an applicable collective bargaining agreement is nugatory. *J.I. Case Co. v. NLRB,* 321 U.S. 332, 339 (1944).

issue, of course, is the status of the employee at the time the alleged breach of contract occurred, as the courts in *Eitmann* and *Olguin* necessarily found. Here, as in those cases, on the date of discharge, respondents' terms and conditions of employment (including discharge) were covered by a collective bargaining agreement. The complaint disputes the propriety of respondents' discharge. It is inescapable that the propriety of the discharge can only be determined with reference to the collective bargaining agreement, whether or not the purported individual agreements survived.

The court below also attempted to distinguish *Olguin* by emphasizing that the plaintiff's wrongful discharge claim in that case, unlike the claims in the instant case, "fit neatly" within the scope of the collective bargaining agreement's "just cause" discharge provisions; as a result, the *Olguin* action was "easily susceptible" to recharacterization as a Section 301 suit.

The *Olguin* case, however is not "distinguishable" on this basis from the case at bar. The plaintiff in *Olguin* alleged that different terms and employment procedures (derived from the employer's personnel manual) applied to his discharge. In the instant case respondents alleged that terms of employment, different than those in the collective bargaining agreement, applied to them in the event of plant shutdown. In each case, the alleged causes of action "fit neatly" into the provisions of the collective bargaining agreement. The *Olguin* plaintiff's charge of

wrongful termination implicated the just cause provisions of his collective bargaining agreement. In the instant case, the allegations in the complaint implicate those terms of the labor contract which expressly govern discharge, plant shutdown, plant relocation and employee transfers. The "fit" between respondents' allegedly "independent" promises of continued employment and the collective bargaining agreement is just as snug as the correlation in *Olguin*. The instant case, then, is likewise "easily susceptible" to recharacterization as a Section 301 claim. The contrary finding of the court below is in conflict with existing case law.

The facts of this case are indistinguishable in all material respects from *Eitmann* and *Olguin*. Accordingly, the decision is in direct conflict with other authority from the Ninth Circuit and other circuit courts. The Court should take this opportunity to resolve the conflict by granting certiorari.

This Court recently granted certiorari in *Metropolitan Life Insurance Co. v. Taylor*, 763 F.2d 216 (6th Cir.), *cert. granted,* 106 S. Ct. 1182 (1986) (Nos. 85-686 and 85-688), to address similar issues in the ERISA context. The instant case presents an even more pressing need for this Court's review, in light of this Court's own pronouncements that the comprehensiveness of federal labor law preemption is even greater than the broad ERISA preemption statute and literally underwrites removal of state law claims which fall within the scope of Section 301. *See Franchise Tax Board,* 463 U.S. at 23.

II

THE CASE BELOW RAISES AN IMPORTANT ISSUE OF FEDERAL COURT JURISDICTION

"Federal question" jurisdiction as set forth in Article III, Section 2, Clause 1 of the United States Constitution, extends federal judicial power to all cases "arising under this Constitution, the Laws of the United States, and Treaties made. . . ." Federal jurisdiction over issues of federal law helps to insure uniformity in the interpretation and construction of federal law. This Court has long recognized that the potential for state court hostility requires that a federal forum be available for vindication of federally created rights. *See Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 347 (1816).

Federal question removal was not intended to effect a "wholesale dislocation" of cases from the state courts, *Boys Markets, Inc. v. Retail Clerk's Union, Local 770,* 398 U.S. 235, 246-47 (1970), and state courts, of course, have concurrent jurisdiction over claims arising under Section 301. This Court has recognized, however, that federal question removal was "intended to provide a forum for the protection of federal rights where such protection was deemed necessary or to encourage the development of expertise by the federal courts in the interpretation of federal law. . . ." *Id.* And with particular reference to federal labor law, the Court has expressly acknowledged that "[r]emoval is . . . one aspect of 'the primacy of the federal judiciary in deciding questions of federal law.'" *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers,* 390 U.S. 557, 560 (1968) (quoting *England v. State Board of Medical Examiners,* 375 U.S. 411, 415-16 (1964)). *See also Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 U.S. 485 (1953).

The decision below impedes a defendant's right to have federal law issues decided in a federal forum, a right that is absolute, when the requirements for removal are met. *Home Insurance Co. v. Morse,* 87 U.S. 445 (1874). Defendants litigating substantial federal issues cannot be content with the mere hope that a particular state court will interpret and apply the substantive federal law correctly, nor can they placate themselves with the knowledge that, in the end, recourse may be had to this Court for review of an erroneous state court decision.

Employers and unions face the prospect that protracted state court litigation over federal questions will become commonplace, as a result of the decision below.[3]

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[3]The tortuous litigation process that may result from the decision below is exemplified by a case now before the California Supreme Court. In *Alpha Beta, Inc. v. Nahm,* 180 Cal.App.3d 324, 225 Cal.Rptr. 551 (1986), plaintiff brought ostensible state tort causes of action against her employer for alleged mistreatment in her bargaining unit position. Despite the fact that all of plaintiff's charges concerned terms of employment governed by the collective bargaining agreement, the state superior court denied the employer's motion for summary judgment based on federal preemption of the state tort claims. *Id.* at 327-28, 225 Cal.Rptr. at 552-54. The California Court of Appeal denied the employer's petition for a writ of prohibition. The California Supreme Court granted a hearing and transferred the matter back to the Court of Appeal, with directions to issue an alternative writ. After o. al argument the Court of Appeal vacated the alternative writ and denied the employer's petition for a peremptory writ. The California Supreme Court denied the employer's second request for a hearing. *Id.*

The employer then filed a petition for writ of certiorari with this Court, which granted the petition and vacated the decision of the California Court of Appeal. In remanding the case, this Court directed the Court of Appeal to reconsider its opinon in light of the Court's most recent analysis of federal labor law preemption, *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985). *Alpha Beta,* 180 Cal.App.3d at 327, 332-33 n.l, 225 Cal.Rptr. at 552-53, 557 n.l.

It is a matter of some record that suits based on state common law for or related to "wrongful termination" are on the rise, and an entire new body of state law has developed which, in many jurisdictions, has eroded the traditional employment at will doctrine. *See* Lopatka, *The Emerging Law of Wrongful Discharge — A Quadrennial Assessment of the Labor Law Issue of the 80s,* 40 Bus. Law 1 (1984); Stieber, *Recent Developments in Employment at Will,* 36 Lab. L.J. 557 (1985).

Individual union employees, such as respondents, have not hesitated in their efforts to take advantage of these developments. In an attempt to divorce themselves from their collective bargaining agreement and the remedies provided therein, union employees have asserted causes of action for breach of purported "individual" employment agreements and related tort actions. *See, e.g., Oglesby v. RCA Corp.,* 752 F.2d 272 (7th Cir. 1985); *Eitmann v. New Orleans Public Service, Inc.,* 730 F.2d 359 (5th Cir.), *cert. denied,* ____ U.S. ____, 105 S. Ct. 433 (1984); *Olguin v. Inspiration Consolidated Copper Co.,* 740 F.2d 1468 (9th Cir. 1984); *Manning v. Bouton,* 678 F.2d 13 (3rd Cir. 1982); *Lewellyn v. Fleming,* 154 F.2d 211 (10th Cir.), *cert. denied,* 329 U.S. 715 (1946). Until the decision below, defendants in such actions have had the option to have these issues resolved in a federal forum, and the federal courts have been forthright in rejecting a union employee's argument that his allegations of "individual" employment contracts provide him

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The California Court of Appeal merely reissued its original decision, with a brief footnote disclaiming the applicability of *Allis-Chalmers* to the case before it. Yet the Court of Appeal flatly admitted that the collective bargaining agreement would be "implicated" to the extent plaintiff's causes of action depended on whether the labor contract was followed or disregarded. *Id.* at 334, 225 Cal.Rptr. at 558. The employer's third request for hearing before the California Supreme Court has been granted. (Case No. SF 25039).

rights independent of the collective bargaining agreement. If the decision below stands, however, it is inevitable that numerous union employees, unhappy with their collectively bargained agreement, will seek to deny defendants their right to a federal forum by suing in state court and artfully pleading a "pre-existing" employment agreement.

Thus, the questions presented to this Court are substantial. It is essential that this Court reaffirm that the collective bargaining agreement is the sole source of a union employee's remedy for violations of negotiable terms and conditions of employment, that the union is the sole negotiator of such terms and conditions of employment, and that federal law is the sole regulator of the collective bargaining relationship. The Court should affirm as well that where, as here, Congress has indicated that only federal remedies are available, it is appropriate to look beyond the face of a plaintiff's complaint to determine whether the true nature of the asserted cause of action sets forth a claim giving rise to federal subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the Association respectfully submits that this case presents a substantial federal question for this Court's review, that the decision below conflicts with other circuit authority and that, accordingly, this Court should grant the petition for writ of certiorari.

Dated: October 24, 1986.

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)

DEBRA L. BOYD
F. CURT KIRSCHNER, JR.

O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000
Attorneys for Amicus Curiae, Merchants and Manufacturers Association

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 24, 1986, I served the within Motion for Leave to file Brief and Brief of Amicus Curiae in re: "Caterpillar Inc., *et al.* vs. Cecil Williams, *et al.*" in the United States Supreme Court, October Term 1986, No. 86-526, on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

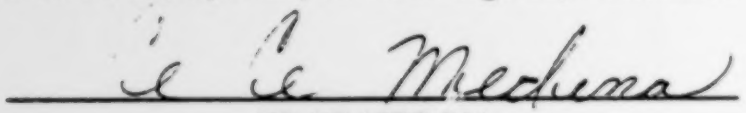
Lawyers Office of George P. McCartin
Fritz Wollet
1760 Solano Avenue
Suite 306
Berkeley, CA 94707-2296

Gary P. Scholick
Littler, Mendelson, Fastiff & Tichy
650 California Street
20th Floor
San Francisco, CA 94108-2693

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 24, 1986, at Los Angeles, California



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JOINT

APPENDIX

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-526

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, KEITH WHEELER,

Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE and JOEL BRYAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

GERALD D. SKONING*
CHARLES C. JACKSON
J. STEPHEN POOR
CHRISTOPHER A. WEALS
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Petitioners

FRITZ WOLLETT*
McCARTIN & WOLLETT
1760 Solano Avenue
Suite 306
Berkeley, California 94707
(415) 526-0121

Attorneys for Respondents

*Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1986
CERTIORARI GRANTED NOVEMBER 17, 1986

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Petition for Removal	Cert. Pet. 32A
Excerpts from Collective Bargaining Agreement, Dated May 1, 1983	Cert. Pet. 57A
Collective Letter of Agreement, dated December 14, 1983	Cert. Pet. 81A
Collective Letter of Agreement, dated March 15, 1984	Cert. Pet. 82A
Collective Memorandum of Understanding, dated June 27, 1984	Cert. Pet. 91A
Notice of Motion and Motion to Dismiss Complaint	Cert. Pet. 93A
Declaration of Keith K. Wheeler in Support of Motion to Dismiss	Cert. Pet. 95A
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Amended Opinion of the United States Court of Appeals for the Ninth Circuit, Amended June 12, 1986	Cert. Pet. 2A
Order of the United States Court of Appeals for the Ninth Circuit Denying Appellees' Petitions for Rehearing and Suggestions for Rehearings *En Banc*	Cert. Pet. 31A

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Record No.	Proceedings
February 1, 1985	1	Petition for Removal, Complaint (filed December 14, 1984, in the Superior Court of the State of California, in and for the County of Alameda), Collective Bargaining Agreement, dated May 1, 1983, Collective Letter of Agreement, dated December 14, 1984, Collective Letter of Agreement, dated March 15, 1984, Collective Memorandum of Understanding, dated June 27, 1984
February 8, 1985	7	Defendants' Notice of Motion and Motion to Dismiss Complaint
February 8, 1985	9	Declaration of Keith K. Wheeler in Support of Motion to Dismiss
February 14, 1985	11	Plaintiffs' Notice of Motion and Motion to Remand Case to State Court
March 6, 1985	25	Declaration of Counsel in Support of Motion to Dismiss and Exhibit A—Grievance re C. Williams
April 1, 1985	29	Order Granting Motion to Dismiss Complaint and Denying Motion to Remand
April 26, 1985	33	Judgment

Date	Record No.	Proceedings
June 13, 1986		Order of the United States Court of Appeals for the Ninth Circuit Amending its April 7, 1986 Opinion
June 13, 1986		Amended Opinion of the United States Court of Appeals for the Ninth Circuit
August 7, 1986		Order of the United States Court of Appeals for the Ninth Circuit Denying Appellees' Petitions for Rehearing and Suggestions for Rehearing *En Banc*
September 29, 1986		Petition for Certiorari filed by Caterpillar Inc. *et al.*
October 23, 1986		Brief in Opposition to Petition for Writ of Certiorari filed by Cecil Williams, *et al.*
November 3, 1986		Reply to Opposition to Petition for Writ of Certiorari filed by Caterpillar Inc., *et al.*
November 17, 1986		Order of Supreme Court granting Petition for Writ of Certiorari

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C85-1346 CAL

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES A. MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, FRED CHAMBERS, PETE CARNUTE, JOEL BRYAN,

Plaintiffs,

vs.

CATERPILLAR TRACTOR COMPANY, ROBERT E. GILMORE, DON FOWLER, JEFF GLICKMAN, AL MATHISEN, HARRY MUNTZ, KEITH WHEELER AND DOES I through XX, inclusive,

Defendants.

DATE: March 15, 1985
TIME: 9:30 a.m.
PLACE: Courtroom 10

NOTICE OF MOTION AND MOTION TO REMAND CASE TO STATE COURT PURSUANT TO 28 U.S.C. § 1447(c) AND FOR COSTS

[Filed February 14, 1985]

PLEASE TAKE NOTICE that on March 15, 1985, at 9:00 a.m. in the Courtroom of the Honorable Charles A. Legge, Courtroom No. 10, 450 Golden Gate Avenue, San Francisco, California, plaintiffs Cecil Williams et al. will move the Court for an order remanding this case to Superior Court for the County of Alameda pursuant to 28 U.S.C. § 1447(c). This motion is based upon 28 U.S.C. § 1447, this Notice of Motion and Motion to Remand, the Memorandum in Support of Motion to Remand and the complaint filed in Alameda County Superior Court on December 17, 1984.

Dated: 2/14/85

/s/ Fritz Wollett

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C85-1346 CAL

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES A. MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, FRED CHAMBERS, PETE CARNUTE, JOEL BRYAN,

Plaintiffs,

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CATERPILLAR TRACTOR COMPANY, ROBERT E. GILMORE, DON FOWLER, JEFF GLICKMAN, AL MATHISEN, HARRY MUNTZ, KEITH WHEELER AND DOES I through XX, inclusive,

Defendants.

DATE: March 15, 1985
TIME: 9:30 a.m.
PLACE: Courtroom 10

DECLARATION OF GARY P. SCHOLICK IN SUPPORT OF REPLY MEMORANDUM RE MOTION TO DISMISS

[Filed March 8, 1985]

I, GARY P. SCHOLICK, hereby declare and state:

1. I am a shareholder of the law firm of Littler, Mendelson, Fastiff & Tichy, a Professional Corporation, 650 California Street, 20th Floor, San Francisco, California, and am one of the attorneys representing Caterpillar Tractor Co. herein. I have firsthand knowledge of the facts stated herein, and if called as a witness to testify, I would be competent to so testify.

2. Attached hereto as Exhibit A is a true and correct copy of a grievance filed by the union representing Plaintiff Williams with regard to his layoff date from Defendant Caterpillar.

3. I have read the foregoing Declaration, consisting of this and one (1) other typewritten page, and declare under penalty of perjury that it is true and correct.

Executed this 8th day of March, 1985, at San Francisco, California.

/s/ Gary P. Scholick

EXHIBIT A

Union Copy — White
Company Copy — Canary
Steward's Copy — Pink

GRIEVANCE FORM: BAY AREA, DISTRICT 115, I.A.M. & A.W.

COMPANY Caterpillar BASE RATE _____ Grievance # _____

EMPLOYEE NAME Local 284 CLASSIFICATION _____ DATE HIRED _____

STATEMENT OF GRIEVANCE Article 10 / Article 14 / but not limited too [sic]

C. Williams has been informed by the company that he will be laid off 3/8/85 out of seniority

C. Williams has not submitted a written request for a early layoff

C. Williams has told company representative (Keith Wheeler) that he didn't want to be laid off at any time here or at any [sic] time

SETTLEMENT DESIRED Layoff notice to be withdrawn. If laid off [sic] does occur to be paid any and all monies due him including any over time that he would have normally worked from this layoff date to his normal lay-off date

_____ Date _____ Hughie Date 3-5-85

Employee's Signature Shop Steward's Signature

Grievance received by _____ Date _____

Company Signature

Steward and Foreman **STEP 2** Date of Meeting _____

DECISION _____

Settled ☐ Referred to Step 3 ☐

_____ Date _____ By _____ Date _____

Steward's Signature Company Signature

Business Representative and Management **STEP 3** Date of Meeting _____

DECISION _____

Settled ☐ Referred to Step 4 ☐

_____ Date _____ By _____ Date _____

Business Representative's Signature Management's Signature

Grievance Review Committee **STEP 4** Date of Meeting _____

DECISION _____

_____ Date _____ By _____ Date _____

Chairman Board of Adjustment's Signature Secretary Board of Adjustment's Signature

Arbitration **STEP 5** Date of Meeting _____

PETITIONER'S

BRIEF

(8)

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-526

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1986

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Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Of Counsel:

THEODORE R. JOHNSON
NANCY L. SNOWDEN
Caterpillar Inc.
100 Northeast Adams Street
Peoria, Illinois 61679
(309) 675-4278

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

GERALD D. SKONING*
CHARLES C. JACKSON
J. STEPHEN POOR
CHRISTOPHER A. WEALS
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Petitioners

**Counsel of Record*

50pp

QUESTIONS PRESENTED

1. Whether the court of appeals' opinion, that a state action is "completely preempted" by a federal statute such as to afford removal jurisdiction only if a superseding federal remedy exists, survives the principles announced in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) and *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968).

2. Whether state law claims based upon allegedly "independent" employment contracts of individuals concededly covered by a collective bargaining agreement are within the scope of Section 301 of the Labor Management Relations Act of 1947 and therefore properly removed to federal court and dismissed for failure to exhaust contractual grievance procedures.

AMENDED RULE 28.1 STATEMENT

Caterpillar Inc., whose name was Caterpillar Tractor Co. at the time the instant lawsuit was filed, has no parent company. Its non-wholly-owned subsidiaries and affiliates are: Advanced Technology Services, Inc.; C.D. High Technology, Inc.; Fared Robert Systems, Inc.; Industrial Lasers, Inc.; Equipment Financing Associates, a partnership; Turbo Techcomercio e Servicos de Manutencao de Turbinas Ltda. (Brazil); Caterpillar Mitsubishi Ltd. (Japan); Tractor Engineers Limited (India); P.T. Natra Raya (Indonesia); Caterpillar Limited (U.K); Rapidparts, Inc.; MEC-Track S.p.A. (Italy); Advanced Filtration Systems, Inc.; and Vehicle Systems, Inc.

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No. 86-526

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported *sub nom. Williams* v. *Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir.), *cert. granted*, 107 S. Ct. 455 (1986),[1] and is reproduced in the appendix to the Petition for Certiorari ("Cert. Pet.") (1A-19A). The Ninth Circuit's Order denying rehearing and rehearing *en banc* is also reproduced in the appendix to the Petition for Certiorari, as is the unreported opinion of the district court (Cert. Pet. 20A-22A, 31A).

[1]In May of 1986, Caterpillar Tractor Co. was dissolved and simultaneously reincorporated under the name of Caterpillar Inc. Petitioner's Amended Statement Required By Rule 28.1 appears at page ii of this brief.

JURISDICTION

The initial decision of the court of appeals issued on April 7, 1986. Petitioners filed a timely Petition For Rehearing And Suggestion For Rehearing *En Banc* on May 5, 1986, after the time for filing the Petition was extended by the court of appeals. On June 12, 1986, the court of appeals issued an amended decision, the subject of the Petition For A Writ Of Certiorari. On June 19, 1986, Petitioners filed a timely Petition For Rehearing And Suggestion For Rehearing *En Banc* with respect to the court's June 12, 1986 amended opinion. Both Petitions For Rehearing And Suggestions For Rehearing *En Banc* were denied by the court of appeals in an order dated August 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS

The following provisions of the removal statute, 28 U.S.C. §§ 1441-52, are pertinent to this case:

Section 1441. Actions Removable Generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or

causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

The following provisions of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-87, are pertinent to this case:

Section 9(a), 29 U.S.C. § 159(a):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Section 201(a), 29 U.S.C. § 171(a):

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees . . . .

Section 203(d), 29 U.S.C. § 173(d):

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Section 301(a), 29 U.S.C. § 185(a):

Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Respondent Cecil Williams and fifteen other plaintiffs ("respondents") were employed by petitioner Caterpillar Inc. ("Caterpillar") and were members of Local Lodge No. 284, International Association of Machinists, AFL-CIO (the "Union"). At the time respondents filed suit in December, 1984 against Caterpillar and several management employees, their terms and conditions of employment were governed by a collective bargaining agreement executed by the Union and Caterpillar in May of 1983. Respondents' complaint, however, seeks relief under state law for Caterpillar's claimed breach of employment agreements allegedly "independent" of their collective bargaining agreement. Respondents' claims are based upon written documents issued while respondents were in the bargaining unit, and upon alleged oral statements made both during their employment in the bargaining unit and before respondents reentered the ranks of Caterpillar's unionized work force from nonunion positions. The district court concluded that respondents' complaint stated claims under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and that the case was properly removed to federal court. The district court then dismissed the complaint without prejudice for respondents to refile with the proper allegations under Section 301.[2] Respondents chose not to refile their complaint and appealed. The court of appeals reversed, concluding that the case was not removable.

A. The Terms And Conditions Of Respondents' Employment As of December 1984

Since 1942, Caterpillar and the Union have been parties to collective bargaining agreements which, according to the complaint, "pertain[ed] to hourly employees" at Caterpillar's San Leandro,

[2]This ruling applied to all respondents except Fred Chambers, who was a nonunion weekly employee at the time the complaint was filed. Caterpillar conceded that his claims were not removable as such, see R. 18 at 7 and Cert. Pet. 96A-97A, and not susceptible to dismissal based upon the requirements of federal labor law. R. 8 at 3 n.3. The district court therefore ordered Chambers' claims remanded to state court. Cert. Pet. 22A.

California facility. Cert. Pet. 49A, 58A-92A; R. 1, Ex. B. Article 1 of the agreement that became effective May 1, 1983 provided that Caterpillar must recognize the Union as the "sole bargaining agent" for respondents and all other hourly production employees. Article 2 required all such employees to "be and remain . . . member[s] of the Union" as a "condition of employment." Cert. Pet. 58A-62A. The complaint alleges that all respondents were hired as hourly, unionized employees, later "advanced" to various nonunion positions and returned to hourly unionized positions at various times between May, 1980 and January, 1984. Cert. Pet. 40A-42A, 97A-98A; R. 1, Ex. B at 89-99. All respondents, save two, had returned to the bargaining unit before May of 1983 when Caterpillar and the Union negotiated their most recent master labor agreement. *Id.*

As Union members, respondents were entitled to extensive benefits under the labor agreement. Express provisions of the agreement contemplated that, from time to time, employees would move between union and nonunion positions, and afforded employees the right to apply their Caterpillar employment in nonunion positions toward benefits under the labor contract. For example, Article 8 measured seniority "from an employee's first day of employment in the bargaining unit since his last date of hire with Company," crediting respondents for time worked outside the bargaining unit. Article 7.6 similarly defined "service" for vacation and separation pay purposes as "the measurement of all full-time employment with the Company, its predecessors and subsidiaries," without regard to whether that service was accumulated in union or nonunion positions. Cert. Pet. 62A-64A.

Through the collective bargaining process, Caterpillar and the Union also dealt at length with employee rights upon closure or shutdown of the San Leandro plant. Article 14 authorized respondents to exercise their full seniority against downgrades or layoffs and to obtain recalls from layoff. Cert. Pet. 76A-77A. Similarly, Article 13.9 required Caterpillar to pay respondents termination

pay in the event of a decision to close the San Leandro plant and increased termination benefits in accordance with their seniority. Article 13.9 also afforded respondents full medical and dental benefits for 180 days following termination. Cert. Pet. 74A-76A.[3] Article 13.10 gave respondents the right, "[i]n the event manufacturing operations of the San Leandro plant" moved "in whole or in part" to new Caterpillar locations within a specified area, to "transfer" with their jobs to such locations. *Id.*

The 1983 collective bargaining agreement also granted Caterpillar certain rights. On respondents' behalf, the Union agreed that Caterpillar could terminate respondents for just cause, could decide whether work would be performed at the San Leandro plant, and could decide to close the plant and thereby terminate respondents' employment. In such an event, respondents had no right of transfer elsewhere, unless their "job[s were] moved to a new location . . . ." Cert. Pet. 74A-76A. Caterpillar's rights were not unfettered, however, but subject to the contractual grievance procedures. Article 10 defined a grievance as "any difference which may arise . . . between the Company and an employee covered by this agreement as to . . . [a]ny matter involving wages

[3]Following Caterpillar's tentative and final decisions to close the San Leandro plant, Caterpillar and the Union negotiated Letters of Agreement, dated December 14, 1983 and March 15 and June 27, 1984, that further improved benefits applicable to the plant's terminating employees. These included provisions to protect terminating employees against forfeiture of termination pay, and provisions extending medical and dental insurance coverage to greater numbers of employees and requiring Caterpillar to continue indefinitely payments of the cost of medical and life insurance coverages up to specified maximums for terminating employees eligible to receive Special Early Retirement Benefits but otherwise not eligible to retire under Caterpillar's Non-Contributory Pension Plan. Cert. Pet. 81A-92A.

Early retirees eligible to retire under the Non-Contributory Plan qualified under these Letters of Agreement to have Caterpillar pay the full cost of medical benefits. *Id.* The labor agreement was further amended to provide terminating employees, at Caterpillar's cost, counseling by Caterpillar as to all benefit entitlements, vocational counseling, outplacement assistance and a tuition reimbursement allowance. *Id.*

. . . hours of work, or working conditions covered by the Agreement, or . . . [a]ny matter involving the application or interpretation of any provisions of this Agreement." Cert. Pet. 65A. In addition to plant closure termination disputes, the grievance procedure covered disputes as to whether there was "just cause" for terminating employees. *Id.* If the parties were unable to resolve a grievance, it was subject to final and binding arbitration. Cert. Pet. 65A-69A.

B. Respondents' Purported State-Law Suit

In December 1983, Caterpillar announced that it would close the San Leandro plant in mid-1985 (the first respondents were laid off from their bargaining unit jobs beginning in October 1984). Respondents filed suit in December 1984 in the Superior Court of the State of California against Caterpillar and five of its managers, protesting their layoffs or pending layoffs from the bargaining unit and claiming that Caterpillar's decision to close the plant was "wrongful." Cert. Pet. 38A-56A, 98A. Based upon alleged oral "promises [that] were continually and repeatedly made to [respondents] while they were management or weekly salaried employees" before they reentered the unionized work force and other alleged written and oral representations made while respondents were in the bargaining unit, *id.* at 49A, the complaint purports to raise four separate counts under California law: breach of contract, breach of the covenant of good faith and fair dealing, intentional infliction of mental distress and fraud.

Specifically, the complaint asserts that "throughout [respondents'] period of employment with Caterpillar there existed an employment agreement between [respondents] and Caterpillar evidenced by various written and oral representations by Caterpillar . . . ." Cert. Pet. 42A. It avers that Caterpillar "made clear its intention to employ them indefinitely by promoting them from entry level [unionized] hourly positions to mid-level technical or weekly positions and to management positions," and by providing

respondents "favorable performance evaluations," "payment increases," and training. Cert. Pet. 43A. Caterpillar's "written representations" consist of passages from its "Welcome to Caterpillar" employee handbook given to respondents at the time of their hire as unionized employees, which state Caterpillar's "hope" that all new employees will have a "long and rewarding work experience." Cert. Pet. 44A. The other written representations cited by the complaint are excerpts from Caterpillar's "Code of Worldwide Business Conduct and Operating Principles," addressed "TO CATERPILLAR PEOPLE" and distributed after May 1, 1982, when Williams and other respondents had already reentered the unionized work force. Cert. Pet. 40A-42A, 45A. The Code is alleged to provide "assurances" when it states the need to develop "long-lasting relationships" with customers and employees based on normative standards of business conduct. *Id.*

The complaint further alleges oral commitments by unnamed Caterpillar representatives that respondents "could look forward to indefinite and lasting employment with the corporation and that they could count on the corporation to take care of them." Cert. Pet. 43A. These unidentified persons allegedly "assured" respondents that if the San Leandro facility ever closed "Caterpillar would provide employment opportunities for [respondents] at other facilities of Caterpillar . . . ." It is further claimed that, at the time of respondents' downgrades to unionized positions, unidentified supervisors orally "assured" respondents their downgrades were only temporary. Respondents further allege that, even after they reentered the unionized work force, unspecified individuals orally "continued to assure [respondents] that defendants would adhere to the agreement made with [respondents] while [respondents] were management or weekly salaried employees." Cert. Pet. 48A, 49A. On March 5, 1985, three months after filing suit, and after Caterpillar's timely removal of the case to federal court, see Cert. Pet. 32A-37A, respondent Williams

filed a grievance under the collective bargaining agreement protesting his layoff from the San Leandro plant "now or at any [sic] time." J.A. 6; R. 9 at 5.[1]

C. The Decisions Below

On March 15, 1985, the district court held that removal was proper. The court concluded that the complaint stated a federal claim arising under LMRA Section 301 and held respondents' state-law claims preempted. The court granted Caterpillar's motion to dismiss because respondents failed to allege exhaustion of applicable grievance procedures and provided respondents leave to amend. Cert. Pet. 20A-21A, 28A. Respondents chose not to amend and timely filed an appeal to the court of appeals.

The court of appeals reversed the district court, concluding that the case was not properly removed. Acknowledging principles addressed by this Court in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the Ninth Circuit stated that a suit may be removed to federal court under 28 U.S.C. section 1441(a) only if it could have been brought there originally. Under the "well-pleaded complaint" rule, a federal question must appear from the complaint and not from any defense the defendant might raise to defeat a cause of action. Cert. Pet. 4A-5A. An "exception" to this rule, and to the principle that the plaintiff is generally considered the "master" of his complaint, exists with respect to complaints that are "artfully pled." "The 'artful pleading' doctrine permits federal courts to investigate the true nature of the plaintiff's affirmative allegations, after looking to 'the petition for removal to clarify the action presented in the complaint in determining whether it raises a federal question.'" Cert. Pet. 5A. Under *Franchise Tax Board*, "'if a

[1] The grievance stated that Williams would be "laid off" on March 3, 1985. J.A. 6. The court of appeals inexplicably stated that Williams was "discharged shortly after the San Leandro facility closed in 1983." Cert. Pet. 3A.

federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal statute necessarily arises under federal law.'" Cert. Pet. 7A.

To determine whether a complaint is "completely preempted," the court of appeals then formulated a test based upon several of its prior decisions: "A state cause of action [is] 'completely preempted' when federal law . . . provides both a superseding remedy replacing the state law cause of action *and* preempts that state law cause of action." Cert. Pet. 7A (emphasis in original). Under this analysis, federal courts must first determine whether "it is apparent from a review of the complaint that federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered." Cert. Pet. 9A.[1] The "proper approach" to preemption removal cases refuses to consider the scope of preemption until after the federal court determines that a federal remedy exists for the state-law claim: "If, and only if [this finding is made], then a federal court must determine whether the state-law cause of action *is* preempted." Cert. Pet. 9A, 12A (emphasis in original).[2]

Applying these rules to the case before it, the court of appeals reasoned that no remedy was available to respondents under Section 301 and the collective bargaining agreement. The complaint

[1] In so ruling, the Ninth Circuit disavowed any conflicting implication contained in other removal cases it previously decided as to "the propriety of the order of decision." Cert. Pet. 13A.

[2] Although the terms "cause of action" and "remedy" are legally distinct, see *infra* pp. 18-19, the Ninth Circuit equated "cause of action" with the relief a court could award. See Cert. Pet. 8A n.2 (rejecting argument that relief is irrelevant to question of preemptive force of federal law and stating that the "existence of a substitute federal remedy, in addition to preemption, is required by our precedent"); Cert. Pet. 16A ("Here not even a reference to the collective bargaining agreement is necessary, other than to ascertain that no provision of the agreement can even arguably be construed to provide a remedy for their complaint."); Cert. Pet. 17A-18A ("Section 301 does not provide the plaintiffs any cause of action for the injury they allege.").

stated claims outside the scope of Section 301 because, under Ninth Circuit precedent, "for jurisdiction to lie under § 301, 'the rights and liabilities of the parties . . . must be a product of the bargaining agreement itself, and not of some other origin.'" Cert. Pet. 14A.[3] For, the court found, was resolution of respondents' state-law cause of action "focused" upon interpretation of the collective bargaining agreement because that agreement could not "even arguably be construed to provide a remedy for their complaint." Cert. Pet. 15A-16A. On this basis, the court of appeals refused to consider Caterpillar's argument that the bargaining agreement superseded and extinguished all previous obligations claimed by respondents. The court termed this argument a "defensive allegation" of preemption that could only be resolved by a state court, "[d]espite the defendant's real and substantial interest in having the federal preemption argument decided by a federal court." Cert. Pet. 16A.

SUMMARY OF ARGUMENT

The court of appeals' decision cannot be reconciled with settled removal jurisdiction and labor law principles established by this Court. Section 301 completely preempts all state-law causes of action that come "within [its] scope" and such suits, for purposes of removal jurisdiction, "necessarily 'arise[] under' federal law." E.g., *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968). Such cases are therefore necessarily removable to federal court. Section 301 preemption must be interpreted expansively and issues as to the reach of a collective bargaining agreement must be resolved with due respect for the exclusive representative status of respondents' union and the exclusivity of the labor agreement's grievance-arbitration procedures. Removal and Section 301 principles necessarily fore-

[3] "[T]he contract breach alleged involves the violation of entirely separate and independent contracts made outside of the collective bargaining process." Cert. Pet. 14A.

close the mechanical and unworkable analysis the court of appeals has fashioned for resolving preemption/removal questions under Section 301.

First, this Court has unmistakably rejected the artificial barrier erected by the court of appeals that a federal court may not evaluate the scope of federal preemption and assert removal jurisdiction unless the court first determines that "federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered." Cert. Pet. 9A. Rather, this Court has adopted precisely the opposite position. So long as a claim "arises under" Section 301, removal is entirely appropriate even though the plaintiff "undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law." *Franchise Tax Board*, 463 U.S. at 23 (emphasis in original). "[T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Avco Corp.*, 390 U.S. at 561. Therefore, the availability of a duplicative remedy under federal law cannot be determinative of whether a purported state-law complaint "comes within the scope" of LMRA Section 301 for removal purposes; the inquiry, instead, is confined to whether the federal cause of action – here LMRA Section 301 – "covers" the state-law claim asserted. *Franchise Tax Board*, 463 U.S. at 23-24. If so, the case is properly removed.

Second, this Court's decisions likewise reject the court of appeals' restrictive assessment of the "scope" of Section 301. According to the Ninth Circuit, "the contract breach alleged involves the violation of entirely separate and independent contracts made outside the collective bargaining process" and the "employee's cause of action arises out of independent contracts, most assuredly not from the collective bargaining agreement." Cert. Pet. 14A. This Court's decisions and the purposes of the labor laws command that Section 301 "is not to be given a narrow reading."

Smith v. *Evening News Association*, 371 U.S. 195, 199 (1962), and that "a restrictive view of *who* may sue under § 301" cannot be countenanced. *Franchise Tax Board*, 463 U.S. at 25 n.28 (emphasis in original). When courts interpret the "scope" of Section 301, the fundamental policies of federal labor law provide that, in establishing employment conditions, employers are prohibited from dealing with any party other than the duly certified bargaining representative, *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 683-84 (1944), and that labor agreements reach disputes beyond their literal terms and "pre-empt" all state-law rights and claims rooted in private, consensual agreements, *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 210-13 (1985). Further, workers covered by collective bargaining agreements are obligated to pursue resolution of their employment-related claims through the contractual grievance procedures because "[i]f a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement." *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965).

When applied to respondents' claim that their alleged "independent contracts" are somehow outside the collective bargaining agreement and the scope of Section 301, these bedrock principles dictate that "individual contracts [do not] survive or surmount collective ones," and that even if some employees may lose by the collective agreement, that result is entirely proper because "[special] advantages to individuals may prove as disruptive of industrial peace as disadvantages." *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944). Thus, as a matter of law, whether the particular advantages claimed by respondents are valid as consistent with the collective bargaining agreement, *id.* at 339, requires application of the collective bargaining agreement and can only be resolved through its exclusive grievance-arbitration procedures. *Republic Steel*, 379 U.S. at 653. Any state law suit attempting to avoid that process, therefore, is properly recharacterized as a Section 301 cause of action and subject to dismissal if the substantive requirements of Section 301 are not met.

Finally, in addition to the broad preemptive force of Section 301 and the expansive scope of claims within its purview, national labor policy's preference for private dispute resolution through exclusive grievance-arbitration procedures is also at odds with the court of appeals' position. Just last term, in *AT&T Technologies, Inc.* v. *Communications Workers*, 106 S. Ct. 1415, 1419-20 (1986), this Court reaffirmed the national policy under Section 301 of channeling labor disputes to grievance-arbitration. See LMRA Sections 201(b) & 203(d), 29 U.S.C. §§171(b) & 173(d). But the inevitable result of the decision below—ad hoc judicial curtailment of Section 301 removal jurisdiction and its exclusivity policies in favor of state court adjudication of labor law controversies—would deprive parties to collective bargaining agreements of this "uniform and exclusive method for orderly settlement of employee grievances," thereby "inevitably exert-[ing] a disruptive influence upon both the negotiation and administration of collective agreements." *Republic Steel*, 379 U.S. at 653. The court of appeals' approach also would alter impermissibly the methods chosen for resolving disputes in tens of thousands of collective bargaining agreements that have been adopted in the last thirty years, thereby destroying the interests of those who relied on prior law.

ARGUMENT

I. Contrary To The Ninth Circuit, The Propriety Of Removal Jurisdiction Of The Federal Courts Cannot Be Conditioned Upon The Presence Or Absence Of A Superseding Federal Remedy.

The federal removal statute governs the removal of cases from state court. "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court . . . ." 28 U.S.C. §1441(a). In *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court revisited the principles governing original and removal jurisdiction of the federal courts. With

respect to most of these principles, the Ninth Circuit's decision raises no issue. Where, as here, diversity of citizenship between the parties is lacking, "the propriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States district courts." *Id.* at 8. Federal question jurisdiction, in turn, extends to "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. Compare U.S. Const. art. III, §2 and *Franchise Tax Board*, 463 U.S. at 8 n.9.[8] Thus, a case may be removed to federal court if it "arises under" federal law.

A state cause of action "arises under" federal law for purposes of the removal statute if the federal question appears on the face of the plaintiff's "well-pleaded" complaint. *Franchise Tax Board*, 463 U.S. at 9-10; *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, 106 S. Ct. 3229, 3232 (1986).[9] If a plaintiff's right to relief under state law can be determined "without reference to federal law," then federal law is not a "necessary element" of the plaintiff's complaint. *Franchise Tax Board*, 463 U.S. at 13. In such cases, federal law "becomes relevant only by way of defense to an obligation created entirely by state law," and "a case may not be removed to federal court on the basis of a defense, including the defense of preemption." *Id.* at 1344; see also *Merrell Dow Pharmaceuticals*, 106 S. Ct. at 3232. Nevertheless, "[a]lthough we have often repeated that 'the party who brings a suit is master to

[8]By its terms, LMRA Section 301 confers original jurisdiction on the federal courts, see 29 U.S.C. §185, and is sufficient, considered alone, to support removal under 28 U.S.C. §1441(a). *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557, 560 (1968). Section 301 claims are also plainly federal question claims under 28 U.S.C. §1331, and Section 301 is also an "Act of Congress regulating commerce" within the meaning of 28 U.S.C. §1337. Accordingly, if the claims in this case in fact are cognizable under Section 301, see *infra* Section II, there is original jurisdiction under 29 U.S.C. §185 and 28 U.S.C. §1337 as well as under 28 U.S.C. §1331. *Franchise Tax Board*, 463 U.S. at 8 n.7.

[9]See also *Gully* v. *First National Bank*, 299 U.S. 109 (1936); *Taylor* v. *Anderson*, 234 U.S. 74 (1914).

decide what law he will rely upon,' it is an independent corollary of the well-pleaded complaint rule that plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Board*, 463 U.S. at 22 (citations omitted); see also *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981). Whether the state law complaint omits to plead "necessary federal questions," *Franchise Tax Board*, 463 U.S. at 22, or whether its claims are "really" federal law claims, *id.* at 13, must be determined by evaluating the preemptive scope of the particular federal cause of action raised by the removing party. *Id.* at 23-24.[10]

Whatever the difficulty of determining removal jurisdiction in cases where preemption is less than complete, "if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law," and is removable to federal court. *Id.* at 24; see *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557, 560 (1968); U.S. Const. art. VI, cl. 2 (supremacy clause). Under this principle of "complete" preemption, the state law cause of action is "recharacterize[d] . . . as one that actually arises under federal law, despite the plaintiff's usual mastery over his complaint." Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 661 (1984). In such cases, the question of federal preemption is not a "defense" to a state law claim because, if the state law has been completely preempted and replaced by a federal cause of action, the plaintiff "necessarily is stating a federal claim whether he wishes to do so or not, and the case is removable." C. Wright, *The Law of Federal Courts* 216 (4th ed. 1983).

[10]Alternatively, removal jurisdiction may be based upon a complaint that shows that the "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board*, 463 U.S. at 28. Whether or not the "right to relief" removal analysis applies to Section 301 cases in addition to the "cause of action" analysis, this Court explicitly stated the need to satisfy the tests in the disjunctive. *Id.* See *infra* note 24.

The court of appeals did not disagree with this analysis, Cert. Pet. 7A, and had the court applied it to this case, the district court's judgment would have been affirmed. But the court of appeals went on to formulate an unprecedented "two-part test" for determining "complete preemption" that is totally at odds with this Court's evaluation of such cases. According to the Ninth Circuit:

> [A] state law cause of action has been "completely preempted" when federal law both displaces *and* supplants a state law—that is, when federal law provides both a superseding remedy replacing the state cause of action *and* preempts that state law cause of action . . . . These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court.

Cert. Pet. 7A (emphasis in original); see *supra* p. 10. Thus, because Section 301 and the collective bargaining agreement allegedly could not provide the remedies sought by the complaint—*i.e.*, enforcement of "independent" employment contracts and an award of compensatory and punitive damages—removal was improper. Cert. Pet. 14A-16A. The Ninth Circuit's new formulation[11] thus makes federal question jurisdiction turn, not upon the power of the court to decide the claim which is the foundation for any relief, but upon the particular form of relief that the plaintiff chooses to seek. This cart-before-the-horse approach is meritless.

This Court has never endorsed an approach that refuses to consider the scope of preemption unless a federal remedy is first found and, in fact, took precisely the opposite position in both *Avco* and *Franchise Tax Board*. In *Avco*, the petitioner-employer

[11]Contra *Stone* v. *Stone*, 632 F.2d 740, 744 (9th Cir. 1980) (concurring opinion) (federal jurisdiction is not dependent on relief sought in complaint), *cert. denied*, 453 U.S. 922 (1981); *Spokane County Legal Services, Inc.* v. *Legal Services Corp.*, 614 F.2d 662, 667 (9th Cir. 1980) (same); *Garrett* v. *TIME-D.C., Inc.*, 502 F.2d 627, 630 (9th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975) (same).

(Avco) filed suit in state court alleging that the respondent union, with which Avco had a valid labor contract, had violated the agreement by participating in and sanctioning work stoppages. Avco's suit sought temporary and permanent injunctions against further breaches. 390 U.S. at 558. Under the law in effect at the time, however, a federal court had no substantive power to grant the injunctive relief Avco sought. *Id.* at 560. In approving removal, this Court had the opportunity to embrace the exact requirement of superseding relief imposed by the Ninth Circuit but expressly declined to do so:

> [T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter. Any error in granting or designing relief "does not go to the jurisdiction of the court."

Id. at 561 (quoting *Swift & Co.* v. *United States*, 276 U.S. 311 (1928)).[12] Compare 6 J. Moore, *Moore's Federal Practice*

[12]See also *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 247 n.6 (1962) ("Our holding . . . is that the suit is a § 301 suit; whether there is a claim upon which relief can be granted is a separate question."); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiff] could actually recover"); *DiGiovanni* v. *Camden Fire Insurance Association*, 296 U.S. 64, 69 (1935) ("Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give."); *Sperry Gyroscope Co.* v. *Arma Engineering Co.*, 271 U.S. 232, 235 (1926) (a statutory limitation upon "remedy . . . goes to the merits of the matter, and not . . . to the question of jurisdiction"); *General Investment Co.* v. *New York Central Railroad Co.*, 271 U.S. 228, 230 (1926) ("By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; *and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought.*") (emphasis added); *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 498, 500 (1923) ("The Federal court may therefore be obliged to deny an equitable remedy

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¶ 54.60, at 293-96 (2d ed. 1986) (although Fed. R. Civ. P. 8(a)(3) requires that "every pleading setting forth a claim for relief should contain a demand, for judgment, this prayer for relief constitutes no part of the pleader's cause of action") with Fed. R. Civ. P. 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings").

As this Court reiterated in *Franchise Tax Board*, it is entirely appropriate to remove claims completely preempted by federal law even if it is "impossible" for the federal court to award the relief sought and the relief can "only" be obtained under state law:

> The Court of Appeals held, [in *Avco*], and we affirmed, that the petitioner's action "arose under" § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law.

463 U.S. at 23 (emphasis in original; citations omitted). In light of these decisions, the court of appeals clearly erred in holding that courts must find that federal law both "displaces *and* supplants" state law as a prerequisite to removal jurisdiction in situations where a federal law has completely preempted the state cause of action.

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which the plaintiff might have secured in a state court. . . . The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a Federal court."); *Venner* v. *Great Northern Railway Co.*, 209 U.S. 24, 35 (1908) ("The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action.").

A careful assessment of the facts of *Franchise Tax Board* shows exactly how far afield the Ninth Circuit's approach is. Even though this Court's holding addressed the removal jurisdiction of federal courts, the issue was framed, in the first sentence of the Court's opinion, as whether a substantive federal statute permitted the plaintiff to sue under its terms: "The principal . . . question is whether the Employee Retirement Income Security Act of 1974 (ERISA) . . . permits state tax authorities to collect unpaid state income taxes by levying on funds held in trust under an ERISA-covered vacation benefit plan." *Id.* at 3-4. Removal was improper, not because of the absence of a federal "remedy," but because the plaintiff—a California state tax agency--was not a proper party to sue under ERISA as plan participants, beneficiaries and fiduciaries would have been. *Id.* at 21, 24-27. As such, the tax agency plaintiff could not state a cause of action under ERISA and, therefore, its claim could not "arise under" federal law. *Id.* In contrast, had the vacation trust filed suit for a declaratory judgment under ERISA to determine whether the plan trustees were obliged to comply with California's attempted levy on its funds, there unquestionably would have been ERISA federal question jurisdiction. *Id.* at 26-27. Cf. *Taylor* v. *General Motors Corp., and Metropolitan Life Insurance Co.*, 763 F.2d 216 (6th Cir. 1985), *cert. granted*, 106 S. Ct. 1182 (1986) (Nos. 85-686 & 85-688) (addressing issue of ERISA preemption/removal). In short, the focus of this Court's inquiry was not on whether federal law provided a remedy for the plaintiff's claim, but on whether "either of [the tax agency's] claims in this case [came] within the scope of one of ERISA's causes of action." *Franchise Tax Board*, 463 U.S. at 24-25.[11]

[11]Again, this analysis applies when the federal court is asked to evaluate whether plaintiff's complaint establishes that federal law creates his cause of action. An alternative basis for finding removal jurisdiction is also present whenever the plaintiff's right to relief under state law necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Board*, 463 U.S. at 27-28. For the reasons stated *infra* note 24, it is equally appropriate, but not necessary, for this Court to find removal jurisdiction on this latter basis as well.

Removal jurisdiction based on Section 301 preemption offers a straightforward opportunity to apply the correct analysis. First, a court must ask whether the scope of preemption by the asserted federal statute is complete. On this issue, there can be no dispute. As this Court originally stated in *Avco Corp.* and reiterated in *Franchise Tax Board*:

> [T]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.

Id. at 23 (footnote omitted). Cf. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 677 (1974) (federal court has original jurisdiction because, wholly apart from application of state-law principles, possessory right asserted is federally protected); *Reid* v. *United States*, 715 F.2d 1148, 1153 (7th Cir. 1983) (because federal eminent domain power is exclusive, state law actions to enjoin trespass by federal government are in fact actions for inverse condemnation arising under federal law and removable to federal court). Thus, a suit falling within the parameters of Section 301, even if cast as a state-law claim, "is 'really' one of federal law" and is properly removable to federal court. *Franchise Tax Board*, 463 U.S. at 13.[14]

[14]In *Avco Corp.* v. *Aero Lodge, Local 735*, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968), the court of appeals stated:

> State law does not exist as an independent source of private rights to enforce collective bargaining contracts. While State courts may have concurrent jurisdiction, they are bound to apply Federal law. The force of Federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint.

Id. at 340 (citation omitted). Consequently, the court held, Avco's claim arose under federal law and removal was proper. *Id.* See also *Fristoe* v. *Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *Johnson* v.

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Once a court concludes, as it must, that Section 301 preemption is complete, the only remaining question is whether the complaint falls within the scope of Section 301. If so, the state law claims must be recharacterized as federal claims "arising under" federal law and within the original jurisdiction of the federal court, making removal appropriate. *Id.* at 23-24. If not, the state claims remain intact and the case must be remanded to state court. Regardless of the outcome of that inquiry, it is clear that federal, not state courts, must determine in the first instance whether a purported state cause of action is necessarily federal because it falls within an area asserted to be occupied exclusively by federal law. *Avco Corp.*, 390 U.S. at 560 ("[R]emoval is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law.' "); *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 246-67 (1970) (same).

II. The District Court Properly Asserted Jurisdiction And Dismissed This Case Because Respondents' Claims Fall Within The Scope Of Section 301.

The district court had before it plaintiffs whose complaint alleged that (1) at the time of suit they were (and had been for some years) members of, and exclusively represented by, a union; (2) they were covered by an extensive collective bargaining agreement, the provisions of which addressed plant closing and termination issues and extended termination and other benefits based upon both union and nonunion employment with Caterpillar; (3) they had access to grievance-arbitration procedures to

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England, 356 F.2d 44, 48 (9th Cir.), *cert. denied*, 384 U.S. 961 (1966).

Although the courts of appeals have expressed a legitimate concern that the failure to mention Section 301 in the complaint is too often little more than a trial tactic to avoid the force of Section 301, *see infra* note 22, a finding that the complaint is "artfully pled" in the sense of a deliberate effort to avoid Section 301 is not necessary to obtain federal jurisdiction. The essential issue is not the motive of the plaintiff, but the scope of federal law. Comment, *supra* p. 16, at 661.

address any dispute involving interpretation of the labor agreement and other disputes concerning wages and hours of employment; and (4) Caterpillar breached implied contractual commitments to them concerning termination issues based upon oral representations by unnamed individuals before and after respondents reentered the unionized work force and upon writings they received while unionized employees. Inasmuch as respondents unquestionably possessed the right to sue for their individual rights under Section 301, e.g., *Smith* v. *Evening News Association*, 371 U.S. 195, 200 (1962), the complaint—on its face and in substance—alleged violations of that federal law and was therefore properly removed. The district court's decision (Cert. Pet. 20A-30A) to assert removal jurisdiction and dismiss respondents' complaint for failure to allege exhaustion of contractual grievance procedures as required by Section 301 should have been beyond dispute.

Partially as a result of its erroneous views of removal jurisdiction, however, the Ninth Circuit narrowly read Section 301 to apply only to claims literally "originating" from the collective bargaining agreement. Cert. Pet. 15A n.5. This unwarranted restriction of Section 301's scope, and surgical preservation of what amount to nothing more than tenuous state law claims commingled with allegations of wrongdoing during respondents' unionized employment, conflict with the fundamental purposes and policies of Section 301 in particular and the labor laws in general. When measured against these purposes and policies—that upon reentry into the unionized work force the Union again became respondents' exclusive representative, that collective bargaining agreements extend beyond their literal terms and preempt all state-law rights and claims rooted in private, consensual agreements, and that the grievance-arbitration procedures were respondents' exclusive avenue for relief—it is clear that the complaint stated a cause of action within the scope of Section 301 and that the decision of the court of appeals should be reversed.

A. When Respondents *decertified* the Unionized Workforce, National Labor Policy "Extinguished" Their "Individual Power" To Order Their Own Contractual Relationships With Caterpillar.

So long as respondents remained outside a "unit appropriate" for "purposes of collective bargaining" for which a labor organization had been chosen as the exclusive representative, 29 U.S.C. § 159(a), their implied contract and derivative tort claims were likewise outside the purview of federal labor law. Upon reentry into the unit, however, federal labor policy mandated that respondents' rights became subordinated to those of the "majority of employees" and that the majority's (and respondents') representative, here the Union, "*shall* be the *exclusive* representatives of *all* the employees in [the] unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 29 U.S.C. § 159(a) (emphasis added). This Court has summarized this exclusive representation principle in the following fashion:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours and working conditions. The policy therefore extinguishes the individual employee's power to order his own relationships with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

NLRB v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967); see also *American Communications Association* v. *Douds*, 339 U.S. 382, 401 (1950).

Under the exclusive representation principle, Caterpillar was obliged to deal solely with respondents' Union concerning their terms and conditions of employment, and any failure to do so would constitute an unfair labor practice. See 29 U.S.C. § 158(a)(5); *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678,

684-85 (1944). Exclusive representation and the concomitant principle of majority rule secure for all unit members the benefits of collective strength and bargaining power with "full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 62 (1975). Majority rule is therefore "[c]entral to the policy of fostering collective bargaining," *id.* at 62, and unions are free — as in this case — to bargain away individual rights in exchange for benefits important to the majority. E.g., *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279-84 (1956) (right to strike); *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 75 (1953) (right to refuse to cross a lawful picket line). These principles are to be enforced with full recognition that "[t]he complete satisfaction of *all* who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).[*]

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[*] Under the exclusive representation principle, the minority's rights are safeguarded, not by carving out unwarranted state-law exceptions to the scope of Section 301, but by the terms and policies of the federal labor laws themselves. The minority's rights are protected from majority abuse in at least three ways. First, the bargaining powers of authorized representatives are confined to a " 'unit appropriate' 'for the purposes of collective bargaining.' " *Allied Chemical & Alkali Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971) (quoting 29 U.S.C. § 159(a)). Second, the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 89-216, 79 Stat. 888 (codified in scattered subsections of 29 U.S.C.), created substantive provisions ensuring internal union democracy. See *Emporium Capwell*, 420 U.S. at 65. Finally, and perhaps most significantly, the union's duty of fair representation extends to all bargaining unit members and not just the politically successful majority. See *Vaca* v. *Sipes*, 386 U.S. 171, 182-88 (1967) (supplying union members cause of action under Section 301 when union arbitrarily or in bad faith refuses to process a grievance); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 571-72 (1976) (supplying union members cause of action under Section 301 if union misconduct has undermined the integrity of the arbitration procedures).

B. The Substantive Law Under Section 301 Is Fashioned From National Labor Policy, Which Is Founded On The Principle Of Exclusive Representation.

The underlying objective of the exclusive representation principle is to promote industrial peace through collective bargaining by establishing the framework for labor and management to negotiate agreements establishing terms and conditions of employment. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938).[9] National labor policy thus holds that all employment-related matters involving unionized employees should be resolved "through the processes of conference and collective bargaining between employers and the representatives of their employees."[10]

The Ninth Circuit's decision directly conflicts with these policies, which are implemented by Section 301. The court of appeals' belief that federal courts must strive to preserve tenuous, private state-law contractual rights without regard to the Union's exclusive representative status necessarily distorted its views of the scope of Section 301. Rather, the scope of Section 301, and its "substantive" content, are necessarily questions of "federal law, which the courts must fashion from the policy of our national labor laws," to the exclusion of "state law." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456, 457 (1957).[11] This Court broadly stated federal labor policy's concern

[9] See also *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 304 (1959); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42, 45 (1937).

[10] LMRA Section 201(a), 29 U.S.C. 171(a).

[11] The federal common law has evolved in several areas to reflect federal labor policy. For example, this Court requires Section 301 suits to be brought within six months, *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); requires an individual bringing suit to exhaust both contractual and intra-union remedies, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965); *Clayton v. International Union, UAW*, 451 U.S. 679 (1981); and requires a showing that the

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over state law that disrupts the establishment and maintenance of contract terms by employers and exclusive representatives of employees in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962):

> [T]he existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.
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> . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area . . . , we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Suits "of a kind covered by § 301," *id.* at 103, include "all suits to vindicate individual employee rights . . . [which] are a major focus of the negotiation and administration of collective bargaining contracts," *Smith v. Evening News Association*, 371 U.S. at 200, as well as "[c]laims involving vacation or overtime pay, work assignment, unfair discharge . . . in short the whole range of disputes traditionally resolved through arbitration," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985); see also *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 699-700 (1966). When evaluating such claims, " § 301 is not to be given a narrow reading," *Smith*, 371 U.S. at 199, and courts are prohibited from taking "a restrictive view of who may sue under § 301." *Franchise*

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individual's union breached its duty of fair representation by engaging in arbitrary conduct. *Del Costello*, 462 U.S. at 153-65. Each of these requirements reflects a conscious decision based on specific elements of federal labor policy and is designed to ensure that federal policy is properly effectuated.

Tax Board, 463 U.S. at 25 n.28 (emphasis in original). Therefore, if it can fairly be said that the Ninth Circuit's "restrictive view," *id.*, authorizes the use of state rules to define the "meaning given a contract phrase or term [or the absence of such a phrase or term]," *Lueck*, 471 U.S. at 202, its decision must be overturned as an unwarranted limitation on matters federal law reserves exclusively to Section 301.

C. Section 301's Scope Extends Beyond The Literal Language Of The Collective Bargaining Agreement To Encompass The "Individual Contracts" Alleged By Plaintiffs Here.

Employees represented by a labor organization find in the collective bargaining agreement their ultimate source of employment rights and conditions of employment. Such agreements are more than contracts addressing specified transactions. Rather, they constitute "generalized codes" between employers and employees (through their unions) regulating the "whole employment *relationship*." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960) (emphasis added); see also *Lueck*, 471 U.S. at 211; *Bowen* v. *United States Postal Service*, 459 U.S. 212, 224-25 (1983); Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-99 (1959). Consistent with this reality, "[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Lueck*, 471 U.S. at 210.[19]

[19]The Ninth Circuit dismissed the application of *Lueck* in a footnote. According to the Ninth Circuit, *Lueck* did not involve a case removed to federal court and, therefore, was "necessarily silent" on removal issues, including the Ninth Circuit's requirement that an "analogous federal remedy" be present to sustain removal. Cert. Pet. 15A-16A n.5. As discussed previously, however, the Ninth Circuit's requirement of an "analogous federal remedy" is completely at odds with settled principles of removal. The issue is whether the complaint falls within the scope of Section 301. If the case falls within the scope of Section 301, it is properly removed and dismissed. Contrary to the Ninth Circuit's holding, *Lueck* provides the precise answer to that question.

In *Lueck*, as in this case, the plaintiff brought suit on claims allegedly "independent" of the collective bargaining agreement—*i.e.*, state tort claims for alleged bad faith handling by Allis-Chalmers and an insurance carrier of insurance benefits created by a collective bargaining agreement. The Wisconsin Supreme Court, like the Ninth Circuit, had held that the plaintiff's state tort claim was "independent" of the labor agreement and, thus, could survive as a separate action. This Court reversed, holding that such a claim related to the collective bargaining agreement and—despite the parties' failure in the agreement to explicitly prohibit "bad faith handling" of insurance claims—was within Section 301's scope and accordingly preempted:

> [Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.
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> . . . The assumption that the labor contract creates no implied rights is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract . . . and, if so, whether Allis-Chalmers' conduct breached that implied contract provision.

Id. at 211, 215.

Perhaps cognizant that their purported state-law claims stated causes of action under the collective bargaining agreement and Section 301 but failed to satisfy some requisite to suit thereunder, see *supra* note 18, respondents here also cast their claims in terms of allegedly "independent" state-law contract and tort claims. The Ninth Circuit accepted respondents' assertion at face value, holding that their "cause of action arises out of independent contracts" and that " 'the rights and liabilities of the parties . . . must

be a product of the bargaining agreement itself, and not of some other origin.' " Cert. Pet. 14A. But the alleged "independence" of respondents' claims is hardly self-evident. Here, respondents' claims are for benefits upon plant closure, a question dealt with extensively in the collective bargaining agreement. Although respondents say their claims are "independent," courts cannot permit labels attached by a plaintiff to his claims to be outcome-determinative; this would "elevate form over substance and allow parties to evade the requirements of § 301." *Lueck*, 471 U.S. at 211.

The purposes and policies of the labor laws, as well as explicit language in the *Lueck* opinion, mandate that *private* agreements concerning employment conditions cannot exist "independently" of the labor contract negotiated by respondents' duly authorized and exclusive representative. In language directly foreshadowing the claims raised by respondents here, the Court in *Lueck* distinguished waivable rights grounded in private, consensual agreements from nonwaivable rights:

> In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.
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> Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. [The] analysis must focus, then, on whether the [state law] . . . as applied here confers non-negotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state-law] claim is inextricably intertwined with consideration of the terms of the labor contract. If the state . . . law purports to define the meaning of the contract relationship, that law is pre-empted.

Id. at 212-13 (citation and footnote omitted). Respondents' private, negotiable contract "rights," for which California law only provides an enforcement mechanism, stand in contrast to an "independent, non-negotiable, state-imposed duty which does not create similar problems of contract interpretation . . . ." *Id.* at 211, 217 n.11.[20] As even respondents agree, a principal inquiry of *any* court that addresses their claims will be "evidence" of Caterpillar's and the Union's "effort[s] to negotiate" concerning the "rights which [r]espondents acquired while they were holding non-union jobs with Caterpillar." Resp. Br. in Op. at 8. Thus, "[t]he right that [respondents] assert[] is rooted in contract, and the [other tort claims they assert] could have been pleaded as a contract claim under § 301." *Lueck*, 471 U.S. at 220.[21] Respon-

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[20]Although this Court in *Lueck* did not resolve the preemptive effect of Section 301 on such "independent, non-negotiable, state-imposed dut[ies]," *id.* at 217 n.11, but deferred that decision "to be fleshed out on a case-by-case basis," *id.* at 220, *Lueck* is not without guidance on this issue:

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. at 219-20 (citation omitted).

[21]The torts pled by respondents are breach of the covenant of good faith and fair dealing, fraud and emotional distress. Each of these torts rests entirely on the alleged independent agreement and alleged breach thereof. For example, respondents allege that Caterpillar's breach of these agreements was in bad faith and thereby tortious. Cert. Pet. 50A-56A. These claims are exactly the issues addressed in *Lueck* and found

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dents' claims arise—on the face of the complaint and in substance—under Section 301 and are "pre-empted" thereby.

The foregoing principles and policies were presaged by this Court in *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), where the Court had the opportunity to comment upon the alleged viability of individual contracts in a case where an employer sought to use individual written contracts to justify a refusal to bargain with a labor organization. The Court held that individual contracts which attempt to set employment conditions different from those established in the collective bargaining agreement are subsumed by that agreement:

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.
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> . . . The practice and philosophy of collective bargaining looks with suspicion of such individual advantages. . . . [Such] advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives
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> . . . [T]he majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to collective result.

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to be preempted. 471 U.S. at 220. Because these claims are "rooted in contract" and because that contract, as a matter of law, implicates the collective bargaining agreement, these claims are preempted by Section 301. *Id.* See also *Bale* v. *General Telephone Co. of California*, 795 F.2d 775, 780 (9th Cir. 1986); *Olguin* v. *Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1475-76 (9th Cir. 1984); *Beers* v. *Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983).

Id. at 338-39. See also *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. at 180.[22]

Therefore, respondents' individual agreements can exist, if at all, only as part and parcel of the collective bargaining agreement. And it makes no difference, under these principles, that the alleged separate agreements were made in part before respondents reentered the bargaining unit rather than when they were already

[22]Numerous decisions of the courts of appeals reject respondents' claim that rights grounded in state-law sources survive the force of, or coexist with, the collective bargaining agreement. See, e.g., *Maushund* v. *Earl C. Smith, Inc.*, 795 F.2d 589, 591 (6th Cir. 1986) (state law claims based on allegedly independent individual agreements have no application to employment relationships which are subject to a collective bargaining agreement; removal appropriate through Section 301); *Welch* v. *Carson Productions Group, Ltd.*, 791 F.2d 13, 16-17 (2d Cir.) (individual's right to withhold consent prior to rebroadcast of commercial properly waived by collective bargaining agreement), *cert. denied*, 55 U.S.L.W. 3411 (1986); *Truex* v. *Garrett Freightlines, Inc.*, 784 F.2d 1347, 1349-50 (9th Cir. 1985) (breach of implied covenant is in part a contract theory implicating the collective bargaining agreement, and thus removable); *Oglesby* v. *RCA Corp.*, 752 F.2d 272, 276 (7th Cir. 1985) (allegations of wrongful discharge properly recharacterized as a section 301 claim, and thus removable). See also *Olguin* v. *Inspiration Consolidated Copper Co.*, 740 F.2d at 1474 (state contract theories can be effective only as part of collective bargaining agreement, and thus removal proper); *Moore* v. *General Motors Corp.*, 739 F.2d 311, 317 (8th Cir. 1984) (tort theories cannot be invoked to challenge employer's conduct with respect to contract rights created by labor agreement), *cert. denied*, 471 U.S. 1099 (1985); *Buscemi* v. *McDonnell Douglas Corp.*, 736 F.2d 1348, 1350 (9th Cir. 1984) (implied employment contract theories cannot be invoked by a union member whose employment is governed by collective bargaining agreement, and thus removal is proper); *Eitmann* v. *New Orleans Public Service Inc.*, 730 F.2d 359, 362-63, 366 (5th Cir.) (pre-existing contracts subsumed in collective bargaining agreement and removal therefore proper), *cert. denied*, 105 S. Ct. 433 (1984); *Manning* v. *Bouton*, 678 F.2d 13, 15 (3d Cir. 1982) (the "collective bargaining agreement supplant[s] any pre-existing individual contracts"); *Lewellyn* v. *Fleming*, 154 F.2d 211 (10th Cir.) (collective agreement "superceded the prior individual contract of employment"), *cert. denied*, 329 U.S. 715 (1946).

in it.[23] Respondents' cause of action was to bring a Section 301 suit to test the validity and effect of the agreements, after exhaustion of the contractual grievance procedures. *Lueck*, 471 U.S. at 215 ("[t]here is no reason to assume that the labor contract as interpreted by the arbitrator would not provide [the] relief [sought]"). Cf. *J.I. Case*, 321 U.S. at 339 (holding out possibility that individual contracts may be "determined [valid] by appropriate forums under the laws of contracts applicable").

Indeed, it is, as a practical matter, impossible to separate respondents' claims of mistreatment with respect to their nonunion employment from their unionized employment. Respondents' implied agreement is asserted to be based upon written materials distributed to all employees while respondents were members of the bargaining unit and upon alleged oral representations made while respondents were both within and outside that unit. At the time of the plant closure, however, respondents were covered by a collective bargaining agreement which specifically dealt with respondents' rights upon a plant closure and increased their benefits based upon their union and nonunion seniority. The contract at Article 13.10 spelled out the conditions upon which respondents had the right to "transfer" to other facilities (the gravamen of respondents' state-law claims), and respondent Williams even filed a grievance over this issue.

[23]The Ninth Circuit contends that the promises were made while respondents were outside the unit, and that this fact changes the analysis. Cert. Pet. 17A n.6. This is a mischaracterization of respondents' claim, which relies upon alleged contractual commitments made while they were in the unionized workforce as well. Even if it were an accurate characterization, however, the analysis must remain the same. Such a case would be no different from the facts of *J.I. Case*, where a previously nonunion unit was organized by a labor organization. Surely a collective bargaining agreement subsequently negotiated in such a case would eliminate preexisting individual agreements. The focus is on the status and terms of respondents' employment at the time the alleged cause of action arose. Where these terms are embodied in a collective bargaining agreement covering the employee at issue, the case falls within Section 301.

Respondents' claims are "inextricably intertwined" and "tightly bound" with questions of contract interpretation, or "substantially dependent upon [the] analysis of the terms of [such] an agreement." *Lueck*, 471 U.S. at 213, 216, 220. Their private consensual agreements are also "rooted in contract" and survive, if at all, under the auspices of the collective bargaining agreement. Thus, the collective bargaining agreement and Section 301 provided respondents a "cause of action" within the meaning of *Franchise Tax Board*, and this case was properly removed to federal court and dismissed.[24]

[24]Although the resolution of respondents' cause of action is strictly a question of federal law, *Textile Workers Union*, 353 U.S. at 456, even under California law respondents' contract claim is as inextricably intertwined with the collective bargaining agreement as were the tort claims in *Lueck*. This illustrates that, even under state law, it is impossible in this case to discuss respondents' allegedly "independent" claims without reference to the labor agreement.

An essential element of respondents' state-law implied in fact contract claim is "the *totality* of the parties' relationship," *i.e.*, respondents' bargaining unit employment and the allegedly inapplicable collective agreement. *Pugh* v. *See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981) (emphasis added); *Smith* v. *Moynihan*, 44 Cal. 53, 63 (1872). Under California law, *before* a court may imply such a promise, the court is required to carefully consider "all the circumstances surrounding the parties":

> In general an implied contract, in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectfully established. The law will imply that a party did make such a stipulation as under the circumstances disclosed, he ought, upon the principles of honesty, justice, and fairness to have made. *Of course, all the circumstances actually surrounding the parties in the particular transactions are to be carefully considered before this implication of a promise is to be indulged.*

Smith v. *Moynihan*, 44 Cal. at 63 (emphasis added).

Thus, under California law, respondents would have been required to offer into evidence facts demonstrating their alleged satisfactory bargaining unit performance, their discharge from bargaining unit positions, Caterpillar's refusal to transfer them from their bargaining unit

(Footnote continued on next page)

D. The Ninth Circuit's Decision Should Be Overturned Because It Offends The Paramount Policy Of Referring Disputes To Arbitration.

After asserting removal jurisdiction, the district court dismissed respondents' complaint because it failed to allege exhaustion of contractual grievance procedures. That decision was entirely correct for, as the Court held in *Lueck*, "[t]here is no reason to assume that the labor contract as interpreted by the arbitrator would not provide . . . relief. . . . The most harmful aspect of [permitting application of state law] is that it [could] allow essentially the same suit to be filed in state court without first exhausting the grievance procedures established in the bargaining agreement." 471 U.S. at 215, 219. The district court's decision thus was faithful to perhaps the most fundamental policy that animates the labor laws—that of honoring the method chosen by the parties for dispute resolution. LMRA Section 203(d) provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. § 173(d).

(Footnote continued from previous page)
positions, and the purported reasons why Caterpillar's preunit "actions and conduct" were "wholly independent" of the collective agreement. *Smith*, 44 Cal. at 63; *Pugh*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927; see *Grunwald-Marx, Inc.* v. *Los Angeles Joint Board Amalgamated Clothing Workers*, 192 Cal. App. 2d 268, 277, 13 Cal. Rptr. 446, 452 (1961); *Division of Labor Law Enforcement Department of Industrial Relations* v. *Safeway Stores, Inc.*, 96 Cal. App. 2d 481, 485, 215 P.2d 773 (1950). The California court would have been required, therefore, to interpret the meaning and effect of the collective agreement and apply federal labor law principles derived from Section 301 in resolving respondents' claim of wrongful discharge. For these reasons, wholly apart from the fact that respondents' complaint states a cause of action under Section 301, any state law action would "turn[] on a question of federal law," and be removable on this basis as well. *Franchise Tax Board*, 463 U.S. at 27. See *supra* notes 10 & 12.

Most often, the "agreed upon" method takes the form of grievance-arbitration that, with exceptions not applicable here, requires all disputes even "arguably" within the reach of the grievance-arbitration procedures be submitted thereunder. *AT&T Technologies, Inc.* v. *Communications Workers*, 106 S. Ct. 1415, 1419 (1986); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960). Under the terms of the labor agreement, which respondents had every right to invoke, their claims as a matter of law were fully grievable and subject to arbitration. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582 (disputes are grievable unless it can be said with "positive assurance" they are not); *Republic Steel*, 379 U.S. at 653 ("it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so").

The Ninth Circuit's decision, if allowed to stand, would create an incentive for litigants to have arbitrable claims resolved in a state judicial forum on the premise that, under a court's strict reading of the contract, no remedy is available. This would make contract interpretation subject to judicial determination, infect the grievance-arbitration machinery with uncertainty, and eviscerate the fundamental labor policy that grievance-arbitration "stabiliz[es] the 'common law' of the plant." *Republic Steel*, 379 U.S. at 653. Furthermore, the Ninth Circuit's search for a contract remedy necessarily involves the court in the *merits* of the dispute. The test of arbitrability, however, cannot turn on the merits of the dispute or the availability of a remedy. *AT&T Technologies*, 106 S. Ct. at 1419.

Apart from its distortions of these substantive standards, the court of appeals' test also disrupts the employer's and union's bargain that arbitration serves as the "exclusive" means for finally resolving disputes—thereby bringing a degree of certainty into the relationship. *Republic Steel*, 379 U.S. at 653. If employees

such as respondents are permitted to ignore these grievance procedures, both union and employer interests in the collective bargaining process will be undermined, and the federal scheme "to secure industrial peace through collective bargaining" will be frustrated. *Id.* at 653; *H.J. Heinz Co.* v. *NLRB*, 311 U.S. 514, 526 (1941).

This is particularly true where, as here, there is no specific exclusion from the grievance procedure for respondents' claims. *AT&T Technologies*, 106 S. Ct. at 1419. The court of appeals' decision opens the door to state-law remedies utterly inconsistent with the terms of the labor agreement. Respondents, in fact, seek compensatory damages for alleged pain and suffering as well as millions of dollars in punitive damages. Plainly one of the express purposes of the exclusivity rule is that, in exchange for benefits provided under the agreement, employees through their union agree to resolve all disputes through grievance-arbitration and forego other remedies. *Republic Steel*, 379 U.S. at 653. The Ninth Circuit's decision, which portends various state-law remedies applied by fifty different jurisdictions to labor contract claims, plainly negates the incentive of employers to agree to private dispute resolution procedures at all. *Lucas Flour*, 369 U.S. at 104.

In short, the allowance of a state cause of action in a case such as this completely undermines the uniformity of collective bargaining which is the foundation of national labor policy. Employers would be subject to a variety of different state laws and regulations and could not depend upon a uniform application of federal law. The uniform application of federal law, however, is the only assurance that national labor policies will be effectuated. The Ninth Circuit's decision is at odds with these policies and should be set aside.

CONCLUSION

For the reasons stated, this Court should reverse the court of appeals' decision with directions to dismiss the complaint as preempted by Section 301.

Respectfully submitted,

GERALD D. SKONING*
CHARLES C. JACKSON
J. STEPHEN POOR
CHRISTOPHER A. WEALS
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Of Counsel:

THEODORE R. JOHNSON
NANCY L. SNOWDEN
Caterpillar Inc.
100 Northeast Adams Street
Peoria, Illinois 61679
(309) 675-4278

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Petitioners

January 16, 1987

**Counsel of Record*

RESPONDENT'S

BRIEF

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No. 86-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT E. GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, HARRY MUNTZ, KEITH WHEELER, and DOES I through XX inclusive,
Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, JAMES MORETTI, ANDREW HORVATH, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE, and JOEL BRYAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS

FRITZ WOLLETT
McCARTIN & WOLLETT
1760 Solano Avenue, Suite 306
Berkeley, CA 94707-2296
(415) 526-0121
Attorneys for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in an action based upon individual contracts of employment alleged to exist under state law on the basis of promises entirely independent of any collective bargaining agreement, a plaintiff's choice of a state law forum must be respected, where the defense is that the individual contracts are invalid as inconsistent with the system of collective bargaining created by the National Labor Relations Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-526

CATERPILLAR, INC., ROBERT E. GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, HARRY MUNTZ, KEITH WHEELER, and DOES I through XX inclusive,
Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, JAMES MORETTI, ANDREW HORVATH, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE, and JOEL BRYAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW AND JURISDICTION

Respondents agree with petitioners' statements as to the opinions below and jurisdiction.

STATUTORY PROVISIONS

In addition to the statutory authority set forth by petitioners, the following provisions of the Labor Management Relations Act, 29 U.S.C. section 152 (3) and (11), are applicable to this case:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a par-

ticular employer, unless this subchapter explicitly states otherwise . . . but shall not include . . . any individual employed as a supervisor . . .

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

STATEMENT OF THE CASE

A. The Complaint

The complaint filed in this case in California Superior Court [1] alleges that:

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[1] Because the principle question in this case is whether the complaint states a cause of action "arising under" federal law (*see* p. 13, *infra*), it is the allegations of the complaint that are primarily pertinent. We note that in several respects, petitioners baldly and materially misrepresent the complaint before the Court. *See, e.g.*, Brief for Petitioner (Pet. Br.) at 4 ("[r]espondents' claims are based upon written documents issued while respondents were in the bargaining unit";) *compare* Pet. App. A-43-A-48, Complaint ¶¶ 27(E)-(F) (alleging that the pertinent written documents were distributed "during the course of [plaintiffs' non-union employment", including in particular October, 1974 and May, 1982, on both of which dates almost all of the plaintiffs were not in the bargaining unit); *id.* at 22 (the "complaint alleged that [plaintiffs] . . . were covered by an extensive collective bargaining agreement, the provisions of which addressed plant closing and termination issues" and that plaintiffs "had access to grievance-arbitration procedures to address any dispute involving the interpretation of the labor agreement and other disputes concerning wages and hours of employment"); *compare* Complaint as a whole and, in particular, Pet. App. A-49, ¶ 29 (mentioning the collective bargaining agreement as part of an allegation that plaintiffs were covered by "a total employment agreement wholly independent of the collective bargaining agreement.")

In addition to the complaint, the factual record in this case consists principally of the collective bargaining agreement and amendments thereto in effect at the time the Caterpillar plant closed and the official service records of the various plaintiffs. Pet. App. A-57-99. The latter documents are pertinent only insofar as they are claimed to demonstrate that the complaint somehow disguises the true nature of plaintiffs' lawsuit. *See* p. 12, *infra*.

Between 1956 and 1968, the various respondents [2] were hired as hourly employees at Caterpillar, Inc.'s facility in San Leandro, California. Pet. App. A-39-A-43. Thereafter, respondents were elevated to positions as managers or weekly salaried employees. *Id.*[3] Still later—for most respondents in mid-1982 or later (Pet. App. A-40-A-42)—"defendants . . . downgraded plaintiffs from management and weekly positions to hourly positions." Pet. App. A-49.

"During the course of plaintiffs' employment, as management or weekly salaried employees," Caterpillar made written and oral representations to respondents that "they could look forward to indefinite and lasting employment with the corporation . . . even when a slowdown in business resulted in downgrades or even in the case of a closing of the San Leandro facility of Caterpillar," and thereby "provided plaintiffs with the assurance that their employment with Caterpillar would be stable and lasting." Pet. App. A-43. In particular, respondents

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[2] Of the original seventeen plaintiffs, thirteen are before this Court as respondents. The complaint of Fred Chambers was remanded to state court because Chambers held a non-bargaining unit position at the time of the plant closing. Pet. App. A-22. Three of the original plaintiffs—Clarence Northern, Richard Kanuse, and Lee Green—are no longer pursuing this action.

[3] The service records submitted by defendants confirm these allegations, and demonstrate that the period of non-bargaining unit employment for the respondents ranged from three to fifteen years, with all but two of the respondents employed outside the bargaining unit for eight years or more. Pet. App. A-97, A-98.

"while serving Caterpillar as managers or weekly salaried employees . . . were assured that if the San Leandro facility of Caterpillar were closed, Caterpillar would provide employment opportunities for plaintiffs at other facilities of Caterpillar, its subsidiaries, divisions, or related companies." Pet. App. A-48. As a result of these "promises . . . continually and repeatedly made . . . while [plaintiffs] were management or weekly salaried employees" there arose "a total employment contract wholly independent of the collective bargaining agreement pertaining to hourly employees." Pet. App. A-49.[4]

In reliance upon that contract, with its guarantee of continued employment even in the event of a closing of the San Leandro plant, and also in reliance upon continued assurances that that contract would be honored, "plaintiffs continued to remain in Caterpillar's employ rather than seeking other employment." Pet. App. A-49; *see also id.* at A-48. Nonetheless, on December 15, 1983, defendants "breached [the] employment agreements by notifying plaintiffs that the San Leandro plant would be closed and subsequently advising plaintiffs that they would be terminated without regard to or in compliance with the individual employment contracts." *Id.*[5]

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[4] Under California law, an implied contract of employment may arise from a combination of factors including duration of employment, commendations and promotions, oral and written assurances of continued employment, and established personnel practices. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327-329 (1981).

[5] Respondents also pleaded state law causes of action for breach of a covenant of good faith and fair dealing (*see Cleary v. American Airlines*, 111 Cal. App. 3rd 443 (1981); *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 250 (1985)), intentional infliction of mental distress (*see Rulon-Miller v. International Business Machines, Inc.*, 162 Cal. App. 3d 241) and fraud. Pet. App. A-50-A-55. However, it is the breach of contract claim upon which petitioners principally rely as supporting removal.

B. The Proceedings

Respondents filed the complaint described above on December 17, 1984. When they learned of the complaint, defendants removed it to federal court (Pet. App. A-32-A-37), on the basis that:

> The alleged promises and agreements made with, between and among, Plaintiffs and Defendants while Plaintiffs were not hourly employees and members of the bargaining unit were, as a matter of federal substantive labor law, merged into and superseded by the above-referenced collective bargaining agreements.

Pet. App. A-36.[6]

Thereupon, both sides filed motions, respondents seeking remand of the complaint to state court and petitioners contending that the complaint should be dismissed for failure to state a cause of action. Pet. App. A-20-A-21. The district court, in a short oral opinion, granted petitioners' motion (*id.*), and dismissed the case after respondents declined to amend their complaint to attempt to allege a cause of action cognizable under § 301 (Pet. App. A-4).

---

[6] Attached to the removal petition was the collective bargaining agreement that pertained to the bargaining unit in which respondents were employed at the time of their termination. Pet. App. A-35. That agreement (as amended) contained provisions pertaining to plant closing and termination pay generally, and to the closing of the San Leandro plant particularly, and provided for a grievance and arbitration procedure. Pet. App. A-65-74, A-81-92. Nothing in that agreement, however, purported to eradicate any separate individual contracts that may have been entered into between petitioners and respondents when respondents were not within the bargaining unit, or to absolve petitioners from meeting their obligations under any such contracts solely because the occasion for providing the promised consideration for nonunit employment, i.e., transferring respondents to other facilities at the time of plant closure, did not arise until respondents were once again bargaining unit employees.

On appeal, the Court of Appeals for the Ninth Circuit reversed. That Court relied upon

> the long-standing rule . . . that [because] the question of federal preemption [of a state law cause of action] is ordinarily relevant only as a potential defense to an obligation created by state law . . . [usually] [i]n such a case, federal jurisdiction does not lie, and the action must be remanded to state court for consideration of the federal preemption defense. See *Franchise Tax Board* [*v. Construction Laborers Vacation Trust*], 463 U.S. 1 (1983).

Pet. App. A-7. The Court of Appeals recognized that where a state court case, as pleaded by the plaintiff, alleges "violation of a collective bargaining agreement," the result is otherwise, because the case then necessarily arises under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, whether the state court complaint so acknowledges or not. Pet. App. A-7. But, said the court below,

> '[F]or jurisdiction to be proper under 301(a), . . . the suit [must be] based on an alleged breach of contract between an employer and a labor organization and . . . the resolution of the lawsuit [must] be focused upon and governed by the terms of the contract.' [Citation omitted]. The complaint brought by the Caterpillar employees meets neither of these requirements. . . . As to the first requirement, the employees' complaint is not based upon any alleged breach of the collective bargaining agreement [but instead] . . . involves the violation of entirely separate and independent contracts made outside of the collective bargaining process . . . . As to the second requirement . . ., resolution of the employees' state law cause of action is not [otherwise] focused upon interpretation of the collective bargaining agreement.

Pet. App. A-14-A-15.

Finally, the Court of Appeals rejected as irrelevant to the removal question before it the argument that

"through the preemptive force of § 301, the bargaining agreement supersedes and extinguishes all previous obligations of the employer to his employees, including independent and pre-existing contracts." Pet. App. A-16. Said the court:

> This is not an argument that the employees' complaint can be recharacterized as a cause of action under § 301. Although we do not comment on the validity of this argument, it remains a defensive allegation . . . raised to defeat the plaintiffs' claims grounded in those independent contracts; it is not a necessary element of [plaintiffs'] affirmative cause of action.

Id.

SUMMARY OF ARGUMENT

1. The complaint does not raise a federal question and therefore is not removable. A century of Supreme Court precedent makes the plaintiff the master of his complaint. Under the "well-pleaded" complaint rule, in order for a case to be removable the case must "arise" under federal law. If the federal court would not have original jurisdiction over the complaint, the case is not removable. Where a claim of federal preemption is raised as a defense to the complaint, the defensive allegation of preemption does not make the complaint removable.

Respondents' complaint did not raise a federal question, could not have been originally filed in federal court, and consequently was not removable. Respondents' causes of action are based solely on individual contracts of employment formed with Caterpillar while Caterpillar employed respondents in managerial or weekly salaried positions, jobs which were not covered by a collective bargaining agreement. Respondents' claims, therefore, are based exclusively on state law and do not "arise under" any federal statute. Petitioners' contention that respondents' individual employment contracts were subsequently superseded by the bargaining agreement and are there-

fore preempted by federal labor law is a matter of defense which, under settled removal principles, is irrelevant to "arising under" jurisdiction.

2. In order for respondents' claims to be removable, the complaint either must (1) state claims which fall within the scope of section 301 or (2) require resolution of a substantial question of federal law. *Franchise Tax Board v. Laborers Vac. Trust*, 463 U.S. 1, 27-28 (1983). Section 301 creates federal jurisdiction over suits for violations of contracts between an employer and a labor organization. The allegations of the complaint relate solely to contracts between employees and employer which came into existence before the employees were covered by a collective bargaining agreement. Consequently, respondents' claims neither fall within the scope of section 301 nor require resolution of a substantial question of federal law. To the extent that the trial court need consider the impact of the bargaining agreement on respondents' claims, that consideration occurs only after the contracts are proven both to have existed initially, and to have been breached by termination, and then only because petitioners are alleging that the individual contracts are superseded by the labor agreement, a defensive allegation grounded upon federal preemption.

The doctrine of "complete preemption" set forth in *Franchise Tax Board*'s discussion of the Court's ruling in *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337 (6th Cir. 1967), *affirmed*, 390 U.S. 557 (1968) does not support removal. In *Avco* suit was brought in state court for violation of a "no-strike" clause in a collective bargaining agreement. The case obviously arose under section 301 and section 301 provided plaintiff with a cause of action. In clear contrast to *Avco*, respondents' suit is not based on the collective bargaining agreement. The contract claims which form the basis for the complaint stand independently of the labor agreement. For that reason, section 301 does not provide respondents with a

federal cause of action. Because respondents' complaint does not originate from the bargaining agreement, the Ninth Circuit correctly held that the absence of a federal cause of action prevented application of the doctrine of "complete preemption" as a basis for removal.

3. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985), does not make the instant case removable. *Lueck* did not address removability. *Lueck* held that a state claim derived from a bargaining agreement must either (1) be treated as a section 301 claim (citing *Avco*) or (2) be dismissed as preempted by section 301. The difference between *Lueck* and the case at bar is startling.

Lueck's claim depended on proof of his entitlement to insurance benefits under the bargaining agreement. The predicate of that claim—the sword of the argument—rested on provisions of the labor agreement which established a disability benefits program in express terms and impliedly required that it be administered fairly and without harassment of claimants.

In contrast, in the instant case, there is no part of the collective bargaining agreement which forms any part of respondents' claims. They need prove nothing with respect to the labor agreement in order to make out a case on the merits. Accordingly, unlike Lueck's claims, respondents' cause of action does not arise under federal law.

The collective bargaining agreement comes into this case only because petitioners have raised it as a shield to respondents' claims, contending that the labor agreement supersedes and extinguishes respondents' personal contract rights. Petitioners assert, in effect, that a state law claim which is not dependent upon proof of a proposition of federal law and for which there is no possible federal cause of action, nevertheless arises under federal law because there is a defense to those claims. *Lueck* does

not support this proposition. Nor does the language of Mr. Justice Jackson's well-traveled and lucid dicta in *J.I. Case v. NLRB*, 321 U.S. 332 (1944) (a favorite of law professors for years), a demonstrably inapposite refusal-to-bargain case which arose under the original National Labor Relations Act and antedated the enactment of section 301 by three years.

Even if one makes the generous assumption that petitioners' merger argument is correct as a matter of federal law, respondents' claims would not have been arbitrable under the bargaining agreement. If the individual contracts were extinguished, they obviously could not form the basis for an arbitrable claim. Respondents' claims therefore, unlike Lueck's, could not arise under federal law.

4. Permitting this case to be litigated in state court recognizes the proper role of the states in deciding federal questions, including defensive assertions of preemption in the context of deciding questions of state law. Petitioners' preemption defense does not deprive the state courts of jurisdiction merely because that defense rests on federal labor law. If state courts erroneously reject a federal preemption defense, Supreme Court review lies to correct error. *Franchise Tax Board*, 463 U.S. at 12 n.12.

A central theme of petitioners' brief rests on their contention that the Court should not allow a plaintiff to use artful pleading to close off defendants' right to a federal forum. No mention is made of petitioners' use of artful pleading to close off respondents' right to have their contract claims decided in a state forum, the court of their choice.

Petitioners' argument is based on the assumption that state courts are not competent to resolve claims involving potential questions of federal labor law. That assumption is contrary to the notion of concurrent jurisdiction over section 301 cases, *Charles Dowd Box Co. v. Courtney*, 368

U.S. 502 (1962), as well as the limits of federal jurisdiction and the removal statute. Congress has limited removal jurisdiction to cases raising a federal question in the complaint. Respondents should not be deprived of their choice of forum merely to accommodate petitioners' strategy of having the merits of their defensive allegation decided by a federal court. The removal statute is not intended to foreclose the right of the state courts to address state claims merely because one of several defenses relies on the doctrine of federal preemption.

ARGUMENT

I. RESPONDENTS' WELL-PLEADED COMPLAINT WAS NOT REMOVABLE MERELY BECAUSE RESPONDENTS HELD BARGAINING UNIT POSITIONS AT THE TIME OF THEIR TERMINATION

The question upon which certiorari was granted in this case is whether a state court lawsuit premised upon an individual contract of employment entered into while the employee was not within any unit represented for collective bargaining purposes under the National Labor Relations Act is one that necessarily arises under federal law, and therefore can be removed to federal court.[7] This

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[7] The "question presented" in the Petition for a Writ of Certiorari properly so characterized the case, consistently with both the removal petition (Pet. App. A-36) and the Ninth Circuit's understanding of the case (Pet. App. A-3). See Cert. Pet. i (question involves a state court action contending that the plaintiff "was wrongfully discharged . . . because prior to entering the bargaining unit, he negotiated an individual employment contract . . ."

Petitioners now seek to recast this case as one involving promises made while the employees were within a unit represented by a labor organization and covered by a collective bargaining agreement. *See* n.1, *supra*; *see also* Pet. Br. at 34 & n. 23. But petitioners are not entitled at this late date to redefine the case in a manner inconsistent with the question upon which this Court granted certiorari. Rule 34.1(a), Rules of the Supreme Court of

question is one that turns basically upon the application of the statutes governing federal court jurisdiction. Whether a state court lawsuit of this kind is one which, as a substantive matter, is precluded by any of the various federal labor statutes is a separate matter, pertinent to the question before this Court only in that deciding the jurisdictional issue requires to some degree an appreciation of the true nature of any *potential* federal preemption contentions defendants may choose to raise in order to avoid liability when this case is remanded, as we contend it should be, to state court. But there is, as we show below, no reason, and indeed no basis, for this Court actually to resolve the federal preemption issues petitioners, and their amici, vigorously press. We mention this matter at the outset because petitioners and their amici in large part seek to obscure it, and to present this case as one necessarily turning upon, and definitively deciding, the federal labor law preemption question. It is to the jurisdictional problem actually before this Court—that is, whether it should be the state or the federal courts that ultimately decide the substantive fed-

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the United States. And, in any event, petitioners misrepresent the complaint: The oral representations relied upon as creating the contractual obligation occurred "throughout [plaintiffs] *non-union* employment with Caterpillar," (Pet. App. A-43, emphasis supplied). While some of the written documents relied upon were *in existence* while some or all of the respondents were in the bargaining unit, they are relied upon for purposes of this case only as "representations . . . made . . . while plaintiffs were employed as managers or weekly salaried employees." Pet. App. A-48. *See also* n.1, *supra*.

We note that the difference between an individual employment contract entered into by bargaining unit employees and one entered into while outside any bargaining unit might well be a significant one on the merits of the preemption issue entwined in this case. *See* p. 30, *infra*. Whether the distinction is also of significance with regard to the federal court jurisdiction issue actually before this Court is much more questionable; we believe that it is not. *See* p. 13, *infra*.

eral law issue that may—but only may (*see* p. 29, *infra*) —govern the outcome of this case—that we therefore now turn.

A. The Well-Pleaded Complaint Rule

The removal statute, 28 U.S.C. Section 1441, requires the federal court to possess "original jurisdiction" before taking jurisdiction over a removed complaint. Since 1887,[8] this Court has consistently followed the rule that in order to create "arising under" jurisdiction ". . . a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank*, 299 U.S. 109, 112 (1936). Because the plaintiff is considered the 'master' of his complaint (*The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3233 n.6 (1986) citing *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) ("the plaintiff is absolute master of what jurisdiction he will appeal to").

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[8] In 1887, Congress amended the removal statute to require, as a prerequisite to removal, that the complaint could have been brought originally in federal court. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, as amended by Act. of Aug. 13, 1888, ch. 866, 25 Stat. 433. *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894). Prior to that amendment, federal courts allowed jurisdiction on the basis of a federal defense. *See Railroad Co. v. Mississippi*, 102 U.S. 135 (1880). *Franchise Tax Board*, 463 U.S. at 10 n.9. Thus, it is clear that Congress could expand removal jurisdiction to include a defense based upon federal law. It is equally clear, however, that Congress has intentionally chosen not to do so, and that "[f]or better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law." (emphasis in original). *Franchise Tax Board*, 463 U.S. at 10; *see also id.* at n.9 (repeated proposals to permit removal of cases in which a federal defense may be dispositive have not been adopted).

Consequently, "not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully, supra*, 299 U.S. at 115. In particular, it is "settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Board*, 463 U.S. at 12 and cases cited at n.11.[9]

The well-pleaded complaint rule serves a number of important policies. By requiring that the federal question be apparent from a reading of the complaint, the rule avoids "more-or-less automatically a number of potentially serious federal-state conflicts." *Franchise Tax Board*, 463 U.S. at 10-11. Since federal courts are courts of limited jurisdiction, the rule minimizes the risk of the erosion of the authority of the state by improper expansion of federal jurisdiction. Since the allegations of the complaint may be resolved on state grounds, the well-pleaded complaint rule avoids premature assumption of jurisdiction on the basis of federal defenses which the

[9] "[O]f course, the absence of original jurisdiction does not mean that there is no federal forum in which a preemption defense may be heard." *Franchise Tax Board*, 463 U.S. at 12 n.12. Rather, an appeal may lie to this Court from a final state court judgment rejecting a preemption defense (28 U.S.C. 1257(-b)), while this Court's certiorari jurisdiction may be invoked with respect to any properly raised and preserved federal questions. 28 U.S.C. 1257(c). This Court has in fact decided numerous federal labor law preemption questions on appeal or on writs of certiorari in cases that have proceeded through the state courts. In the last ten years alone, those cases have included *International Longshoremen's Association v. Davis*, 106 S. Ct. 1904 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380 (1985); *Belknap v. Hale*, 463 U.S. 491 (1983); *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*, 436 U.S. 180 (1978); *Farmer v. United Brotherhood of Carpenters 7 Joiners*, 430 U.S. 290 (1977).

court may never reach. Plaintiff's right to select the forum in which to hear his case is protected. In addition, the well-pleaded complaint doctrine preserves plaintiff's right to choose to forego any federal cause of action he may have, basing his claims solely on state law. The foregoing considerations avoid filling already crowded federal court dockets with cases which are "primarily state-law matters, even though a federal issue lurks in the background." Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U.Chi.L.Rev. 634, 645-46 (1984). Focusing on the language of the complaint ". . . saves considerable time and expense, and enhances the predictability, reliability, uniformity and reviewability of results." *Id.* at 642.

The strength of this Court's century-old, virtually unyielding adherence to the "powerful doctrine" (*Franchise Tax Board*, 463 U.S. at 9) of the well-pleaded complaint rule is evident from the manner in which it is applied. For example, where removal is based on diversity of citizenship and plaintiff has sued both resident and nonresident defendants, the Court has held that plaintiff's decision to name resident parties as defendants is controlling on the federal court for purposes of diversity jurisdiction, *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931). Unless it is clear that there is no colorable basis for plaintiff's assertion of claims against resident defendants, plaintiff's mastery of the complaint is conclusive and defeats removal jurisdiction based on diversity of citizenship. *Chicago, R.I. & P. Ry. v. Schwyhart*, 227 U.S. 184 (1913). Similarly, where plaintiff invokes original federal jurisdiction by filing a complaint contending that at least one of his causes of action arises under the Constitution or a law of the United States, that suit may not be dismissed for lack of subject matter jurisdiction unless the "alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial or frivo-

lous." *Bell v. Hood*, 327 U.S. 678, 682 (1946). Under the doctrine of substantiality, as long as it is clear that there is some colorable basis for the claim of federal jurisdiction, the complaint may not be dismissed for want of jurisdiction. *See also, Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3239 n.3 (1986) (dissenting opinion of J. Brennan.) Likewise, as long as there is some colorable basis for state jurisdiction, plaintiff's decision to assert that claim should be honored. These two lines of authority afford additional examples of this Court's adherence to a rule which acknowledges plaintiff's right to plead his case as he sees fit.

B. Respondents' Complaint Is Not Removable Under The Doctrine Of Complete Preemption

This Court has recognized an exception to the well-pleaded complaint doctrine where the claims set forth in the complaint truly arise under federal law and plaintiff intentionally fails to allege his federal cause of action. This exception, sometimes referred to as "complete preemption" or "artful pleading," provides the basis for removal jurisdiction where the claims can only be federal in nature. As stated in *Franchise Tax Board*, "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint . . ." 463 U.S. at 22 citing *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337 (6th Cir. 1967), *affirmed*, 390 U.S. 557 (1968). This exception to the well-pleaded complaint rule has been narrowly construed.

Avco supplies the most glaring example of failing to plead an obvious federal cause of action in state court. Ignoring its obvious federal cause of action under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. section 185, plaintiff brought a contract action against the union in state court for violation of a no-strike clause in the parties' collective bargaining agreement, seeking an injunction against further breach. At the time plaintiff initiated suit it was clear from *Textile*

Workers v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) and *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962) that the employer possessed a federal cause of action under section 301 and that federal law would control its state law claim. However, the employer chose to file in state court because under federal law at that time injunctive relief was not available.

As explained in *Franchise Tax Board*, 463 U.S. at 22-23, *Avco* held that the complaint was removable because it was clear that section 301 provided plaintiff's exclusive cause of action, regardless of whether the federal courts could provide plaintiff with the desired relief. The dispute in *Avco* was removable because plaintiff's suit was necessarily based on the bargaining agreement which contained the no-strike clause, "section 301 expressly supplied the plaintiff . . . with a federal cause of action to replace its preempted state contract claim," *Id.* at 26, and therefore "any complaint that [came] within the scope of the federal cause of action necessarily '[arose] under' federal law.'" *Id.* at 24. The employer's claim, therefore, was artfully pled, and removable because it was obviously federal.[10]

Petitioners' argument that the Ninth Circuit mistakenly failed to apply the doctrine of complete preemption here is misplaced. *Avco* sought to enforce a labor agreement in state court. In contrast, respondents' claims do not seek to enforce a right or benefit provided by the labor agreement and therefore do not fall within section 301's cause of action.

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[10] In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) this Court upheld removal noting the "settled principle" that courts will "not permit plaintiff to use artful pleading to close off defendant's right to a federal forum." 452 U.S. at 397 n.2. In *Moitie*, plaintiffs refiled actions in state court which had previously been dismissed on the merits in federal court. This Court accepted the "factual finding" of the lower court that "respondents had attempted to avoid removal jurisdiction by 'artfully' casting their 'essentially federal law claims' as state-law claims." *Id.*

The Ninth Circuit read *Franchise Tax Board* to require that federal law provide both a federal cause of action replacing and preempting the state cause of action before the doctrine of complete preemption would create removal jurisdiction. (Pet. App. A-7, A-8) This reading of *Franchise Tax Board* is consistent with the language in that opinion noting that:

> *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law. *Id.* 463 U.S. at 23-24.[11]

Applying settled Supreme Court law, respondents' complaint is well-pled. Petitioners' preemption contention is defensive. The Ninth Circuit correctly held that the bargaining agreement was not an element of respondents' claims,[12] that section 301 did not provide respondents with

[11] The fact that respondents' complaint in *Merrell Dow Pharmaceuticals, supra*, was held not to be removable despite its explicit reliance on federal law constitutes another reason why the Ninth Circuit's decision should be affirmed, since respondents' claims do not rely on *any* federal law.

[12] Petitioners argue that under California law the court must examine the bargaining agreement as part of "the totality of the parties' relationship." Pet. Brief, at 35, n.24. But respondents can establish the existence of their contracts, looking at "the totality of the parties' relationship," while respondents were managers and weekly salaried employees, without referring to the labor agreement.

Shapiro v. Wells Fargo Realty Advisors, 152 Cal.App.3d 467 (1984), cited by amicus Chamber of Commerce at 21-22, does not require consideration of the bargaining agreement. Shapiro's complaint was dismissed on defendant's motion because plaintiff, a high-level executive, had signed an agreement with defendant subsequent to hire expressly defining his relationship with defendant "as employment-at-will." *Id.* at 473. His express agreement with his employer that he could be terminated at any time precluded any argument that he held an implied-in-fact contract based on other written and oral assurances. *See also Youngman v. Nevada Irrigation Dist.*, 70 C.2d 240, 246-47 (1969) (Under California Law, "[i]n pleading a cause of action on an agreement implied from

a federal cause of action for their claims and that therefore respondents' complaint was not removable under the doctrine of complete preemption as applied in *Avco*.[13]

II. REQUIRING PETITIONERS TO LITIGATE THE MERITS OF THEIR PREEMPTION DEFENSE IN STATE COURT WILL NOT UNDERMINE NATIONAL LABOR POLICY, BUT RATHER WILL PRESERVE THE PROPER ROLE OF THE STATE COURT IN THE FEDERAL SYSTEM

Apparently realizing the overwhelming authority against their position established by the well-pleaded complaint rule and the doctrine that federal preemption is defensive and thus not a basis for "arising under" jurisdiction, petitioners and their amici resort to gross exaggeration of the alleged dire consequences that application of settled principles of removal jurisdiction in this case will have on national labor policy.[14] In so doing,

conduct, only the facts from which the promise is implied must be alleged.").

[13] *Avco* is a square holding that "arising under" jurisdiction lies, even though the particular form of relief sought by the plaintiff is beyond the power of a federal court. Some of the language of the Ninth Circuit's opinion suggests that removal is improper where section 301 and the collective bargaining agreement do not provide particular remedies sought by the complainant. The Ninth Circuit's choice of words is unfortunate but does not change the palpable correctness of its position on removability.

[14] *See, e.g.*, "This unwarranted restriction of Section 301's scope, and surgical preservation of what amount to nothing more than tenuous state law claims . . . conflict with the fundamental purposes and policies of Section 301 in particular and the labor laws in general." (Pet. Br. at 23); "[T]he allowance of a state cause of action in a case such as this completely undermines the uniformity of collective bargaining which is the foundation of national labor policy." (Pet. Br. at 38); ". . . this Court must not allow the Ninth Circuit to eviscerate Section 301 and the national policy of enforcing collective agreements . . ." (Brief of Equal Employment Advisory Council at 13); "The Ninth Circuit's decision . . . minimizes industry's ability to solve disputes internally and increases the opportunity for greater industrial strife." (Brief of Merchants and

petitioners rely on essentially two arguments. First, that on the merits respondents' claims are preempted and therefore they must be removable and second, that respondents' claims are so "tenuous" [15] they are not worthy of consideration in a state forum and should be decided now in the context of removability by the Supreme Court, especially in light of the threat respondents' assertions pose to the "fundamental purposes and policies of section 301 in particular and the labor laws in general." [16]

In order to reach this result petitioners and their amici contend that: (1) the holding of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904 (1985), a case not dealing with removability, should be extended to allow the removal of cases making claims not derived from the bargaining agreement; (2) the holding of *J.I. Case v. NLRB*, 321 U.S. 332 (1944) should be interpreted to extinguish all individual contracts made by an employee and his employer even though those promises occurred while the employee worked in a position which, under the NLRA, could never be the subject of collective bargaining and even though the *J.I. Case* opinion explicitly allows individual employment contracts to co-exist with labor agreements, and (3) the presumption of arbitrability found in *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) required respondents to submit their claims to arbitration, even though such a submission obviously would have been futile.

Manufacturers' Association and California Employment Law Council, at 15) "Affirmance of the judgment of the Ninth Circuit would have a devastating effect on collective bargaining relationships." (Brief of Chamber of Commerce at 20).

[15] Petitioners' Brief at 23, 26.

[16] Petitioners' Brief at 23. One wonders if respondents' claims are so "tenuous" why they present such a great threat to federal labor policy and why petitioners could not simply proceed in state court, confident of success on the merits of their preemption defense.

Petitioners' contentions ignore as well the principle of concurrent jurisdiction over section 301 actions, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), the longstanding role that state courts have competently performed in resolving the merits of preemption defenses and the right of any party to petition this Court to review erroneous interpretations of federal law by state judges.[17]

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[17] Numerous lower courts have rejected petitioners' argument that a section 301 preemption defense constitutes an exception to the rule that a federal preemption defense based on a bargaining agreement does not lead to "arising under" jurisdiction under section 301. *See, e.g., Cook v. Georgetown Steel Corp.*, 770 F.2d 1272 (4th Cir. 1985) (suit brought by bargaining unit employees for wages owed them under bargaining agreement withheld by employer in violation of state law not removable under section 301 where complaint did not allege any issues relating to bargaining agreement; defendants' claim that it was entitled to withhold wages under bargaining agreement is defensive); *Medlin v. Boeing Vertol Co.*, 620 F.2d 957 (3rd Cir. 1980) (Where collective bargaining agreement did not cover employees' claim for misrepresentation and breach of contract for employer's failure to reinstate plaintiffs with full seniority, state contract action not removable under section 301 because alleged rights did not arise under collective bargaining agreement even though plaintiffs always employed in bargaining unit positions); *Carpenters Southern Cal. Admin. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984) (contractor failed to make contributions to fringe benefit trusts established under bargaining agreement and trustees filed a lien on contractor's property and sued in state court to foreclose on lien; no basis for removability under section 301, where although bargaining agreement determined amounts owed, rights and liabilities of contractor were governed by state law); *Jones v. General Tire & Rubber Co.*, 541 F.2d 660 (7th Cir. 1976) (Ex-employee's suit in state court for reinstatement based in part upon bargaining agreement not removable under section 301 where employee not in bargaining unit at time of termination and bargaining agreement did not provide reemployment rights for employees outside of bargaining unit); *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2319 (1985). (Discharged collective bargaining unit employee's suit for wrongful discharge in violation of state

A. National Labor Policy Does Not Require This Court To Find That Respondents' Claims Are Preempted And Therefore Removable

The Ninth Circuit ruled that regardless of whether respondents' claims were preempted, federal jurisdiction was lacking. Realizing that petitioners' argument that respondents' individual contracts were "extinguished" by "national labor policy" was completely defensive, the court of appeals declined to hold that the contract claims were removable. Petitioners' arguments would require respondents to plead and prove as part of their complaint, the negative of petitioners' proposition, that the bargaining agreement did not supersede or extinguish prior obligations claimed by respondents because their rights were not waivable by the union and could not be negotiated away.[18] The Ninth Circuit correctly refused

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public policy not removable because not based on bargaining agreement); *La Freniere v. General Electric Co.*, 572 F. Supp. 857 (N.D.N.Y. 1983) (Following discharge for theft, bargaining unit employee sued for defamation in state court; suit not removable under section 301 because proof of defamation does not require referral to bargaining agreement and federal preemption is therefore defensive); *Scott v. New United Motor Mfg.*, 632 F. Supp. 891, 894 (N.D. Cal. 1986) (state wrongful discharge action filed by terminated bargaining unit employee with no right to grieve his discharge not removable under section 301 because "[i]t would be anomalous to hold that section 301 preempts his state remedies because federal law provides the exclusive remedy, only then to discover the plaintiff has no remedies under federal law.")

[18] *Allis Chalmers Corp. v. Lueck, supra,* indicates that state law rights or obligations existing independently of bargaining agreements and conferring non-negotiable state law rights and obligations on employees and employers cannot be negotiated away by collective bargaining. *Id.*, 105 S. Ct. at 1912. Petitioners' brief offers no authority for the proposition that empowered the union to waive rights which were obtained by bargaining unit members while they were employed outside the bargaining unit in positions which, under the National Labor Relations Act, 29 U.S.C. section 152, could not be the subject of collective bargaining. See Statutory Provisions, *supra,* p. 1.

to impose this unprecedented pleading requirement on respondents, realizing that it was sharply at odds with settled removal principles and arising under jurisdiction.

Petitioners argue that the Court should hold as a matter of law that respondents' individual contracts were destroyed by their later downgrade into bargaining unit employment and that therefore their state claims were removable. The principle authority for this startling proposition comes from this Court's decisions in *Lueck* and *J.I. Case v. NLRB*, 321 U.S. 332 (1944). Neither case even remotely supports petitioners' position.

Lueck involved a suit which found its genesis in the labor agreement. In *Lueck* the labor contract provided disability insurance for employees covered by the contract.[19] A bargaining unit employee, Lueck, was injured and filed a disability claim. Lueck and the employer then became involved in a dispute over the handling of Lueck's claims. As a result of that disagreement, Lueck filed suit in state court asserting that Allis-Chalmers and the insurer had engaged in tortious conduct by handling his claim in bad faith. No effort to remove the case was made. Instead it proceeded to the Wisconsin Supreme Court which held that Lueck's claim was not preempted. This Court granted certiorari and reversed.

The Court concluded that Lueck's claims, "although couched in tort, "derive[d] from the rights and obligations established by the contract," 105 S.Ct. at 1914, and that "any attempt to assess liability here inevitably will involve contract interpretation." 105 S. Ct. at 1915. Because the tort action thus arose from the provisions of

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[19] The labor agreement also set forth a grievance-arbitration procedure which included a "special grievance procedure for disability grievances." 105 S. Ct. at 1907. As part of the grievance procedure, a Joint Plant Insurance Committee was given authority to resolve all disputes involving "insurance-related issues." 105 S. Ct. at 1908. All insurance-related grievances were subject to binding arbitration under the bargaining agreement.

the bargaining agreement, and required interpretation of contractual obligations and rights required by the agreement, it was preempted by section 301.[20]

Additionally, *Lueck* held that the state tort action was preempted because of the broad language of the grievance-arbitration clause making arbitrable any dispute relating to any "insurance-related benefits." The Court reasoned that "[s]ince any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if section 301 is not understood to preempt such claims." *Id.* Since the right asserted by *Lueck* was "rooted in contract," 105 S.Ct. at 1916, there was no reason to assume that the labor contract as interpreted by the arbitrator would not provide such relief." 105 S. Ct. at 1913. A finding of preemption was necessary to avoid infringing on the initial role of the arbitrator in interpreting the labor agreement.

Lueck, of course, was never removed and thus does not speak of removability principles in cases raising federal preemption defenses. The *Lueck* analysis, however, is useful in determining what standards should be applied to determine removal in cases raising an issue of pre-

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[20] The Court's statement of the issue:

> Whether section 301 of the Labor Management Relations Act preempts a state-law tort action for bad-faith delay in making disability-benefit payments due under a collective bargaining agreement, 105 S.Ct. at 1909,

and its holding:

> [w]hen resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement, made between the parties in a labor contract, that claim must either be treated as a section 301 claim or dismissed as pre-empted by federal labor-contract law, 105 S.Ct. at 1916,

reflects the close nexus between the state claims and the labor agreement.

emption under section 301. *Lueck* stands for the proposition that a state action is preempted (1) if plaintiff has to prove a substantial federal claim, i.e. Lueck's eligibility for insurance benefits under the bargaining agreement, and (2) if necessary to enforce that claim, a superseding federal cause of action exists which displaces the state cause of action, i.e. Leuck's entitlement to enter the grievance-arbitration machinery and section 301. Because Lueck's state cause of action was based on proving a violation of the bargaining agreement, his claim was really a "federal case in state wrapping paper." *Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341, 1344 (7th Cir. 1986). The labor agreement provided Lueck with a grievance-arbitration remedy for his claim; Lueck's claim was arbitrable because the implied duty to pay benefits in good faith was "tightly bound" with interpretation of the labor agreement;[21] 105 S.Ct. at 1914, and under the "trilogy"[22] his claims presumably were arbitrable under the broad grant of authority to the arbitrator.

The *Lueck* case stands in sharp contrast to this case. Unlike *Lueck*, there is absolutely no basis for arguing that respondents' claims "derive" from or are "rooted in" the bargaining agreement.[23] The bargaining agree-

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[21] "The assumption that the labor contract creates no implied rights is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner. . . ." 105 S.Ct. at 1913.

[22] *See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

[23] The statement in respondents' Brief In Opposition To Certiorari at p. 8, that "evidence as to whether either Caterpillar or the union made any effort to negotiate into any labor agreement the rights which Respondents acquired while they were holding non-union jobs with Caterpillar" cited by petitioners, Pet. Br. at 31, merely expressed respondents' understanding of petitioners' intent

ment is injected into this case solely as a defense to respondents' contractual claims. Respondents are not seeking to enforce a bargaining agreement which provides for respondents' pre-unit contracts. Respondents' claims do not satisfy, therefore, the first prong of the *Lueck* holding. They do not depend upon proof of respondents' eligibility for benefits as Lueck's claims did.

Likewise, respondents' claims do not meet the second prong of the *Lueck* holding. Because the state causes of action are not based on any provision of the collective bargaining agreement, they were clearly not arbitrable and therefore cannot be said to fall within the scope of the superseding federal cause of action provided by section 301. The language of the union agreement in this case limited the arbitrator's jurisdiction to disputes "covered by the Agreement" or involving the application or interpretation "of any provisions of this Agreement." [24] (Cert. Pet. A-65). *Lueck*'s concerns about bypassing the arbitration forum, which led to a finding of section 301 preemption, are inapplicable to respondents' independent contract claims. Respondents are not "bypassing" or "sidestepping" available grievance procedures; rather they are pursuing independent contract claims which do not arise under the bargaining agreement and for the violation of which they possess no claim for relief under any federal statute. See F.R. Civ. P., Rule 8(a).

Petitioners also cite *Lueck* for the rule that respondents' "*private* agreements concerning employment condi-

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to *defend* this action on this basis. Petitioners' assertion that this statement is a concession that respondents' claims are "rooted in [the union] contract" under *Lueck* is a complete fabrication.

[24] Unlike *Lueck*, there is no basis for arguing respondents' claims, expressly or impliedly, are covered by the grievance-arbitration clause even when the presumption of arbitrability is considered. See discussion *infra* pp. 31-32.

tions cannot exist 'independently' of the labor contract negotiated by respondents' duly authorized and exclusive representative." Pet. Br. at 30. As demonstrated above, *Lueck* does not stand for that proposition and this Court's decision in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) directly contradicts it.

In *J.I. Case*, the employer entered into individual contracts of employment with a number of its employees and then used their existence as the ground for refusing to bargain with the union (which had won an election and been certified as the exclusive bargaining representative of the employees) "in any matter affecting rights and obligations under the individual contracts." 321 U.S. at 334. The opinion of the Court was written by Justice Jackson. Because of its eloquence, it is much cited. However, nowhere in his opinion does Justice Jackson suggest, or intimate that pre-unit individual contracts of employment are merged into the collective bargaining agreement and superseded. In fact, Justice Jackson makes clear that there is a role for individual contracts of employment in collective bargaining: "We know of nothing to prevent the employee . . . [from] making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice." 321 U.S. at 339. This is so because, under his view, the collective bargaining agreement is not a contract of employment. "No one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone." 321 U.S. at 335. The collective bargaining agreement may be likened to "the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service." *Id.* Finally, the opinion points out that the Court has reserved "a field for the individual contract, even in industries covered by the National Labor Relations Act." 321 U.S. at 336.

Citing *J.I. Case*, this Court recently reaffirmed its reluctance to interpret national labor policy to overturn individual contracts of employment, where potential conflict exists between labor agreements and personal employment contracts. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). In *Belknap* bargaining unit employees went on strike and the company hired replacements, promising permanent employment. After the strike was settled the employer terminated the replacement employees. This Court held that the replacement employees could sue the employer in state court alleging misrepresentation even though the jobs at issue were within the bargaining unit. The Court held that the claims of the replacements were not preempted by federal labor law because the claims were "no more than peripheral concern" to federal law. 463 U.S. at 510-511.

In reaching this result, the Court wrote that when an employer:

> [promises] the replacements that they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentations may not be pursued. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944); . . . . We find unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damage suits for the employer's breach of these very promises. *Id.*, 463 U.S. at 500.

Relying on *J.I. Case*, *Belknap* noted that individual contracts of employment which conflict with the union contract must yield to the bargaining agreement. But *Belknap* also repeated the caution in *J.I. Case* that any "discontinuance of the individual contracts was 'without prejudice to the assertion of any legal rights the em-

ployee may have acquired under such contract or to any defense thereto by the employer.' " 463 U.S. at 506.

A hypothetical situation similar to the instant case further illustrates the uncertainties of petitioners' preemption defense. Suppose supervisory and management employees enter into contracts with their employer pursuant to which they are the beneficiaries of a noncontributory pension plan. Subsequently, and after their rights under that plan have vested, they are transferred into a bargaining unit represented by a union. Suppose the employer and the union agree in the next collectively negotiated agreement that the rights of all employees who were the beneficiaries of the pension plan for supervisory and middle management personnel, who are now members of the bargaining unit, are superseded by the terms of the collective bargaining agreement and that those antecedently created rights are extinguished.

If those employees make claims for their vested accruals under the supervisory and middle management pension plan which are denied by their employer and if they bring an action under state law to recover those accruals, does their cause of action "arise under" section 301 because the employer arguably has as a defense that the collective bargaining agreement supersedes and extinguishes those claims? The answer would be "no" even if one makes the assumption that the defense is a valid one, an assumption which surely is not free from doubt.

Finally, suppose that the collective bargaining agreement provides for grievance-arbitration over all disputes involving the interpretation and application of the collective bargaining agreement. Does national labor policy require that the former supervisory and middle management employees try to arbitrate their claims to benefits under individual employment arrangements which existed prior to their entrance into the bargaining unit where

it is clear that those claims are not based upon the collective bargaining agreement? Is it true, as petitioners claim (Pet. Br. at 38) that if such claims are permitted to remain in state court which is the forum of plaintiffs' choice, the decision "would completely undermine[s] the uniformity of collective bargaining which is the foundation of national labor policy?" It is hard to see how.

National labor policy does not mandate that respondents' individual contracts of employment are automatically subject to defeasance by the bargaining agreement. At a minimum *J.I. Case* teaches that a careful comparison of the individual contracts and the labor agreement be made before any conclusions be drawn concerning conflict or preemption. Petitioners' argument that national labor policy requires that respondents' individual contracts be permanently extinguished by bargaining unit downgrade is not supported by *J.I. Case* and is at odds with *Belknap*.[25]

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[25] Both this Court and the lower courts consistently have declined to implement a test for section 301 preemption even remotely approaching the standard of automatic defeasance of individual contract rights under state law, merely because the plaintiff is also covered by a bargaining agreement at the time of breach of his personal rights. *Varnum v. Nu-Car Carriers*, 804 F.2d 638 (11th Cir. 1986) (allegation of misrepresentation in negotiation of terms of employment prior to hire into bargaining unit position not preempted by section 301 because fraud occurred prior to plaintiff's acceptance of employment); *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986) (State court suit alleging that defendant violated its promise not to lay off employees at time of hire into bargaining unit positions not preempted by section 301; under *J.I. Case*, plaintiffs may sue for breach of hiring contract not based on bargaining agreement). *Adams v. Budd Co.*, 349 F.2d 368 (3rd Cir. 1965) (No federal jurisdiction over suit by employees under section 301 against employer and union where bargaining agreement abolished plaintiff's "super-seniority" rights obtained at time of hire) *Cf. Franchise Tax Board*, 463 U.S. at 25 n.28 ("But even under section 301 we have never intimidated that any action merely relating to a contract within the coverage of section 301 arises exclusively under that section."); *Lueck*, 105 S.Ct. at 1916 ("Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted by section 301").

B. The Presumption of Arbitrability Did Not Require Respondents to Submit Their Pre-Unit Contracts To Grievance-Arbitration

It is self-evident that respondents' pre-unit claims were not grievable.[26] The bargaining agreement limited the arbitrator's authority to claims rising under the agreement or to matters covered by the agreement. *At most*, as the Ninth Circuit correctly concluded, respondents' independent contracts were collateral to the labor agreement and not arbitrable. *See Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80*, 605 F.2d 1290, 1296 (2nd Cir. 1979); *IBEW, Local 1228 v. Freedom WLNE-TV, Inc.*, 760 F.2d 8, 10 (1st Cir. 1985) ([p]arties to a collective bargaining agreement are contractually bound to arbitrate only disputes which properly come within the scope of the agreed-upon arbitration clause."). Even *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 564 (1960) cited by petitioners, stands for the proposition that arbitrability is restricted to disputes involving "construction of the substantive provisions of the contract." 363 U.S. at 573 (Brennan, J., concurring). No substantive provision of the labor contract could conceivably be stretched to reach respondents' claims.

In the world of grievance-arbitration a claim is arbitrable (and thus within the subject matter jurisdiction of the arbitrator) if it arises under the collective bargaining agreement in the sense that the grievance asserts

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[26] Petitioners' contention of arbitrability rises from the bargaining agreement and is therefore defensive. Because, however, petitioners and all of their amici argue that the Ninth Circuit's decision undermines the national labor policy supporting arbitration, at the risk of belaboring the obvious, we explain why this is not so here.

that the agreement has been misinterpreted and misapplied by the employer. In *Lueck* the plaintiff's claim was arbitrable because he could have asserted that the employer's harassment of him in the administration of the disability benefits program violated an implied term of the agreement. In the instant case that simply is not true. There is no provision of the collective bargaining agreement to which respondents can point and upon which they can stand in asserting a misinterpretation and misapplication of that agreement. A case is not arbitrable where there is no basis in the collectively bargained agreement for the right which is being asserted. The arbitrator would simply never get to the question of whether the employer's defense of supersession was valid. The case would fall because of the absence of subject matter jurisdiction, that is, arbitrability. In this case it is absurd to suppose that Caterpillar and the union agreed that claims of violations of individually negotiated contracts of employment between the employer and non-bargaining unit personnel were within the scope of the executory agreement to arbitrate.[27]

As part of their exaggerated attack on the Ninth Circuit's opinion, petitioners argue that its result will be to involve the courts in the *merits* of arbitrable disputes, allow bargaining unit members to take arbitrable disputes to state court and "eviscerate the fundamental

[27] Respondent Cecil Williams did file a grievance concerning his termination. (Jt. App. at 5). While the record is silent as to the outcome of Williams' grievance, declarations were filed in the district court by four officials of the local union, IAM Lodge No. 284, which indicate generally the Union's position on the lack of grievability of Williams' claims. Those declarations stated:

> The union would not have any jurisdiction under the collective bargaining agreement to grieve allegations of breach of any personal agreements or promises made to employees by Caterpillar while those employees were holding positions as management or weekly salaried employees, even if those employees later were employed in collective bargaining unit positions (Ct.Rec. 233-238, 268-269).

labor policy that grievance-arbitration 'stabilizes the common law of the plant.'" Pet. Br. at 37. But the court of appeals' decision merely decided whether respondents' claims were arbitrable, a proper function for a federal court. *AT&T Technologies, Inc. v. Communications Workers*, 106 S.Ct. 1415, 1419 (1986). How, given the longstanding precedent establishing the presumption of arbitrability, of which *Lueck* and *AT&T Technologies* represent merely the latest examples, can petitioners seriously contend that affirmance of the instant case will destroy grievance-arbitration as the exclusive procedure to establish the "common law of the plant?" Obviously, this Court can, in the process of affirming the decision of the court of appeals, make clear that its holding does not undercut the policy mandating that *arbitrable* disputes be pursued exclusively through the grievance-arbitration machinery.

Equally ridiculous is petitioners' assertion that affirmance of the Ninth Circuit's decision will "negate the incentive of employers to agree to private dispute resolution at all." Pet. Br. at 38. In fact, precisely the opposite could occur if the Court affirms. Employers faced with conducting business in states with laws increasing employee rights may be motivated to bargain with unions as broadly as possible so as to obtain the maximum protection available from national labor laws, in the process minimizing their exposure to state actions with the threat of awards for pain and suffering and punitive damages. The heavy support given petitioners by amici employer groups is undoubtedly motivated as well by a desire to obtain the maximum protection from federal preemption as a defense to state claims. That incentive, while understandable, does not provide a basis for a holding that respondents' access to state court should be foreclosed by the doctrine of removal preemption.[28]

[28] Despite petitioners' suggestions to the contrary, Pet. Br. at 38, regardless of the outcome of this case, unionized employers are

Members of the Court have previously expressed concern about the "easy way in which this Court enlarges the power of the Federal Government—and the Federal Judiciary in particular—at the expense of the States" in cases expanding subject matter jurisdiction under section 301. *United Assn. of Journeymen v. Local 334*, 452 U.S. 615, 639-640 n.13 (1981) (Stevens, J. dissenting). *See also, Golden State Transit Corp. v. City of Los Angeles*, 106 S.Ct. 1395, 1403 (1986) (NLRA preemption) (Rehnquist, J. dissenting). The Court has never, however, abandoned the well-pleaded complaint doctrine to apply removal jurisdiction where section 301 is raised as a defense to non-federal causes of action. This unusual case, which involves allegations of breach of employment contracts entered into by employees occupying positions outside the jurisdiction of the National Labor Relations Act, offers no occasion for erosion of that rule. Petitioners' invitation to the Court to undertake a new direction in the face of the growing trend among the states to broaden employee rights should be declined.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

FRITZ WOLLETT
MCCARTIN & WOLLETT
1760 Solano Avenue, Suite 306
Berkeley, CA 94707-2296
(415) 526-0121
Attorneys for Respondents

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already subject to a variety of laws, state and federal, in addition to the NLRA. *See, e.g., Belknap v. Hale, supra*; *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. 2380 (1985).

REPLY BRIEF

Supreme Court, U.S.
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No. 86-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A.E. MATHISEN, KEITH WHEELER,

Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE and JOEL BRYAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Of Counsel:

THEODORE R. JOHNSON
NANCY L. SNOWDEN
Caterpillar Inc.
100 Northeast Adams Street
Peoria, Illinois 61629
(309) 675-4278

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

GERALD D. SKONING*
CHARLES C. JACKSON
J. STEPHEN POOR
CHRISTOPHER A. WEALS
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Petitioners

**Counsel of Record*

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OCTOBER TERM, 1986

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Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS[1]

The Ninth Circuit held that this case was not properly removed to federal court *because* respondents had no remedy under federal law. Cert. Pet. 7A-9A, 12A. This Court has rejected this "unsound reasoning" (AFL-CIO Br. 18 n.12; Pet. Br. 17-19), and no party now before this Court seriously defends it (Res. Br. 19 n.13). Instead, respondents and their *amici*, with passing reference to the controlling decisions in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), and *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), argue in conclusory terms that petitioners' claim of federal preemption is nothing more than a "defensive" allegation incapable of satisfy-

[1]The Statement Required By Rule 28.1 appears at p. ii of the Brief For Petitioners.

ing the requirements of federal jurisdiction and removal. Respondents then assert that their state-law claims are not preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, due to the importance of the state policies on which respondents rely and the alleged nonarbitrability of the claims. The AFL-CIO, however, parts company with respondents and their other *amici* on this issue, agreeing that "it may well be that other aspects of federal labor law would preclude respondents in this case from recovering upon their asserted state law cause of action" (Br. 4).

Respondents' arguments are untenable. Once the Ninth Circuit's erroneous remedy requirement is eliminated from the removal jurisdiction analysis, there is no basis on which to contend that Section 301 preemption allegations are merely defensive and incapable of supporting federal jurisdiction. Respondents' remaining contention that their state-law claims somehow survive Section 301 preemption is similarly foreclosed by the holdings of this Court.

ARGUMENT

I. Because Section 301 Completely Preempts All State-Law Claims Within Its Scope, Federal Jurisdiction Extends To Such Claims Without Regard To The Language Used In The Complaint.

Respondents agree that their claims are removable if "the complaint either . . . state[s] claims which fall within the scope of section 301 or . . . require[s] resolution of a substantial question of federal law" (Br. 8). Under *Franchise Tax Board*, a suit falling within the parameters of Section 301, even if cast as a state-law claim, "is 'really' one of federal law" and is properly removable to federal court. *Franchise Tax Board*, 463 U.S. at 13. As this Court originally stated in *Avco Corp.* and reiterated in *Franchise Tax Board:*

> [T]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.

Id. at 23 (footnote omitted).

Rather than directly addressing whether the issues asserted in their complaint are within the scope of Section 301, respondents argue that removal is inappropriate, and that petitioners' assertion of Section 301 preemption is merely "defensive," because (1) respondents have not chosen to plead a federal cause of action in their complaint (Br. 8, 17-19); (2) the preemption principles of *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), necessarily are confined to claims pled "to enforce a bargaining agreement" (Br. 25-26); (3) this Court's decision in *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), allows respondents' state-law claims to survive because they are of "no more than peripheral concern" to federal law (Br. 28-29, 34); and (4) respondents' claims are not arbitrable under the collective bargaining agreement because the labor agreement allegedly does not specifically authorize arbitration of such claims (Br. 31-33).[2]

The AFL-CIO, in contrast, does not directly challenge—and in places appears effectively to concede—petitioners' argument that Section 301 preempts respondents' claims. Instead, to avoid a result that limits remedies of unionized workers for contract breaches to the arbitral forum (Br. 4, 6), the AFL-CIO approaches the question from a strictly jurisdictional perspective,

[2]Respondents also argue that the case is not properly characterized as involving promises made while they were in the bargaining unit (Br. 11-12). The issue, however, is squarely presented by the petition for certiorari and clearly presented by respondents' own complaint. Given respondents' dogged adherence to their "well-pleaded complaint," it is difficult to understand how they can ignore the consequences of these allegations. Nevertheless, as noted in petitioners' main brief, whether the promises were made while respondents were union, non-union employees or both is irrelevant (Pet. Br. 34 n.23). The determination of the validity of their "independent contracts" is a matter of federal law under Section 301.

arguing that this Court should give deference to the "nuances of the developing state law" with respect to employment law rights (Br. 7). It further argues that the question of Section 301 preemption is essentially a pleading matter that enters this case defensively, and that under *Belknap* and other cases[3] there is allegedly an "open national labor policy question" as to whether individual contracts may coexist with collective bargaining agreements (Br. 4, 13-30).

All of these arguments suffer from a fundamental confusion of Section 301 preemption principles with labor preemption principles applied in cases falling under the doctrines of *International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). This case involves neither *Garmon* nor *Machinists* preemption. As this Court explained in *Belknap*, *Machinists* preemption seeks to determine whether the conduct at issue was intended by Congress to be unregulated, and hence not subject to conflicting state regulation. *Belknap*, 463 U.S. at 499. So-called *Garmon* preemption seeks to determine whether the state regulation or law is of only peripheral concern to the National Labor Relations Board's jurisdiction to consider and ~~decide~~ unfair labor practices under Section 8 of the National Labor Relations Act, 29 U.S.C. § 158. *Id.* at 498, 509. To the extent the peripheral nature of the state claim is unclear, courts may find, under *Garmon*, that the conflicting "state interests . . . clearly outweigh any possible interference with the Board's function." *Id.* at 511.

Thus, whatever one might think of the proper reach of *Machinists* and *Garmon* preemption as a threshold matter (see *Belknap*, 463 U.S. at 530-33 (Brennan, J., dissenting)), in each case where *Machinists* or *Garmon* preemption is presented the court must

[3]E.g., *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977); *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940).

resolve whether the conflicting state or federal interest is paramount. For example, under the facts of *Belknap*, a preemption defense did not foreclose the state law claims of strike replacements promised continuing employment by a struck employer, despite the fact that the employer's conduct as to striking, unionized employees was shielded from conflicting state regulation.

If considered under a *Machinists* or *Garmon* rubric, the various federal jurisdiction and preemption arguments of respondents and their *amici* might make sense. But because it is Section 301 preemption that is at issue, they do not. *Machinists* and *Garmon* analysis—which involves the balancing of federal interests against conflicting state interests—is "irrelevant" to the different question, presented here, of the scope of Section 301 preemption:

> So-called *Garmon* pre-emption involves protecting the primary jurisdiction of the NLRB, and requires a balancing of state and federal interests. The present tort suit would allow the State to provide a rule of decision where Congress has mandated that federal law should govern. In this situation the balancing of state and federal interests required by *Garmon* pre-emption is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail.

Lueck, 471 U.S. at 214 n.9 (citing *Brown* v. *Hotel and Restaurant Employees*, 468 U.S. 491, 502-03 (1984)); see also *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 102 n.9 (1962).

Because federal law "must prevail," any state action coming within the scope of Section 301 is completely preempted *despite* the importance of the asserted state law or policy. *Lueck*, 471 U.S. at 214 n.9.[4] Such cases are removable to federal court "even

[4]Respondents pose a hypothetical designed to demonstrate how their balancing analysis would apply (Br. at 29). A number of observations are in order regarding the hypothetical. First, as set forth above,

(Footnote continued on following page)

if an otherwise adequate state cause of action were pleaded without reference to federal law" and the "[plaintiff] had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law." *Franchise Tax Board*, 463 U.S. at 23, 24.

Furthermore, once stripped of its erroneous remedy requirement, it is clear that even the Ninth Circuit understood the significance of the distinction between defensive preemption in *Garmon* and *Machinists* cases and complete preemption in Section 301 cases:

> The distinction thus established is between preemption as a defense, allegedly precluding the plaintiff's state law cause of action, as opposed to "complete preemption" which means that the plaintiff's cause of action is necessarily a federal one. . . . Where there is "complete preemption," the . . . "necessary jurisdictional consequence is that the cause of action is made federal, permitting removal."

Cert. Pet. 7A (quoting Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 660 n.122 (1984)). In a case such as this, the question of federal preemption cannot be a "defense" because it is directly determinative of whether the purported state-law claims are, in substance, federal claims "arising under" Section 301.

(Footnote continued from previous page)
Garmon balancing analysis is entirely inappropriate in Section 301 cases where the only issue is whether the claim falls within its scope. See AFL-CIO Br. 33. Second, we note that, regardless of the scope of Section 301, the fact situation posited in respondents' hypothetical clearly falls within the preemptive effect of ERISA and, thus, is federal in nature. Third, the hypothetical illustrates the underlying flaw in respondents' argument, *i.e.*, they confuse the result with the method of reaching that result. Quite simply, the determination of the validity of the hypothesized pension rights is made under federal law. If they are valid benefits, it is because federal law, operating through arbitration, allows those benefits to survive. Thus, while the ultimate result in the hypothetical might or might not be different from that in this case, the method of reaching that result—through application of federal law—is the same.

Where they so arise, the plaintiff is "necessarily . . . stating a federal claim whether he wishes to do so or not, and the case is removable." C. Wright, *The Law of Federal Courts* 216 (4th ed. 1983).[5]

In claiming that the district court erred in considering petitioners' "defensive" allegations, respondents essentially argue that the scope of Section 301 may be defined by the plaintiff.[6] Respondents would distinguish *Avco* on the grounds that, in *Avco*, it was "clear" that the suit was within the scope of Section 301 whereas, in the instant case, it allegedly is not clear (Res. Br. 17). Petitioners, on the other hand, believe that it *is* "clear" that respondents' cause of action falls within Section 301. Regardless, *Avco* does not erect a standard that permits courts to reject Section 301 preemption removal—and employ balancing techniques utilized in *Garmon* cases—based upon the "clearness" of Section 301's applicability. *Avco* holds that "any complaint" that comes within the scope of Section 301 "necessarily 'arises under' federal law" and is removable, *Franchise Tax Board*, 463 U.S. at 24,[7] and

[5]Removal jurisdiction is also proper where the "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board*, 463 U.S. at 28. In the instant case, the viability of respondents' contract claims hinges upon the interrelationship between the "independent" promises and the collective bargaining agreement. See Pet. Br. 35 n.24. While not necessary for resolution of this case, it would be equally appropriate to rest removal jurisdiction on this basis.

[6]Respondents also confuse the doctrine of complete preemption with the question of artful pleading (Br. 16-17). While artful pleading refers to a plaintiff's deliberate effort to avoid pleading a federal question which is a necessary element of the cause asserted, the concept of complete preemption turns, as petitioners' main brief demonstrated (Br. 21-22 & n.14), upon the preemptive effect of the statute at issue, not upon the words pled by the plaintiff.

[7]The concept of "complete preemption" is currently before this Court in *Taylor* v. *General Motors Corp.*, 763 F.2d 216 (6th Cir. 1985), *cert. granted*, 106 S. Ct. 1182 (1986) (Nos. 85-686 & 85-688). *General Motors* involves the effect of the Employment Retirement Income Security

(Footnote continued on following page)

it is precisely the task of the federal court to determine whether respondents' complaint is such a complaint. *Avco Corp.*, 390 U.S. at 560 ("removal is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law'") (footnote and citations omitted).

Thus, Congress has made the decision that claims falling within Section 301 are federal claims to be decided under federal law. Respondents cannot choose whether their claims fall within Section 301, nor are they permitted to deprive the federal court of its rightful jurisdiction by omitting explicitly to plead federal questions in their complaint. As Justice Blackmun wrote in *Lueck*, 471 U.S. at 211:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Under these principles, therefore, it was for the federal court to decide if respondents' claims were within Section 301's scope. As we demonstrate next (see also Pet. Br. 24-36), respondents' claims *are* within the scope of Section 301 and, hence, the district court properly asserted jurisdiction when petitioners removed this case to federal court.[8]

II. Private Contracts Concerning Employment Conditions Cannot Exist "Independently" Of The Collective Bargaining Agreement And Are Necessarily Drawn Within Section 301's Scope.

Respondents argue that their claims do not fall within the scope of Section 301 because (1) their cause of action is independent of and unrelated to a collective bargaining agreement and (2) their claims were not subject to the grievance-arbitration procedure under that collective bargaining agreement (Br. 8-10). These contentions, for reasons already stated (Pet. Br. 24-36), are in error. First, as a matter of federal labor law, the alleged

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(Footnote continued from previous page)
Act ("ERISA") and, thus, does not necessarily dictate the result in this case. Petitioner in *General Motors*, however, correctly notes that if a "federal cause of action completely preempts a state cause of action," a complaint falling within the scope of the federal cause is properly removable regardless of the "well-pleaded complaint doctrine." Brief for General Motors at 22. This also was the holding in part of the Sixth Circuit, which recognized that "courts permit removal to federal court, notwithstanding the well-pleaded complaint doctrine, where an employee in a labor case attempts to assert a common law cause of action against his employer." 763 F.2d at 220.

The AFL-CIO suggests that the viability of any state action should be assessed prior to resolving the complete preemption issue (Br. 7). But the proper analysis was presented to the Court by the petitioner in *International Brotherhood of Electrical Workers* v. *Hechler*, 772 F.2d 788 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1967 (1986) (No. 85-1360), where the IBEW noted that:

> Although the court of appeals' ultimate conclusion was that the federal courts lacked jurisdiction over Respondent's claim, that court properly understood that under . . . [*Avco*], federal jurisdiction would exist if, as the Union contends, Respondent's claim were preempted by, and fell within § 301. Thus the appellate court properly addressed the merits of the preemption issue.

Brief for Petitioner IBEW at 6 n.2. See also Brief for Amicus AFL-CIO in *Allis-Chalmers* v. *Lueck* at 10. The same analysis should hold regardless of whether it is the union or the employer seeking removal.

[8]Both respondents and their *amici* (Res. Br. 10, 21; AFL-CIO Br. 29-30) seek to rely on the principle of concurrent jurisdiction set forth in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962). While there is concurrent jurisdiction in Section 301 cases, this does not defeat removal. To the contrary, the opposite is true. Concurrent jurisdiction establishes the essentially federal nature of Section 301. In such a case, a necessary element of concurrent federal jurisdiction is the right of a defendant to remove such a case to federal court. Whatever forum decides the claim, federal law must prevail.

individual contracts survive, if at all, as part of the governing collective bargaining agreements. See Pet. Br. 28-35; AFL-CIO Br. 28. Second, it simply cannot be said that respondents' claims are not arbitrable. Because there is no explicit exclusion of such claims from the grievance-arbitration provision, they are presumed to be arbitrable. *AT&T Technologies, Inc.* v. *Communication Workers*, 106 S. Ct. 1415 (1986); Pet. Br. 36-38.

A. Section 301 Requires That Respondents' "Independent Agreements" Survive, If At All, As Part Of The Collective Bargaining Agreement.

The complaint pleads that respondents—employees who reentered the unionized workforce—possessed individual, private contract rights over and above those provided by the collective bargaining agreement negotiated by their exclusive bargaining representative, Local Lodge No. 284 of the International Association of Machinists.[9] Respondents agree that a principal inquiry of *any* court that addresses their claims will be "evidence" of Caterpillar's and the Union's "effort[s] to negotiate" concerning the contract "rights which [r]espondents acquired while they were holding non-union jobs with Caterpillar." Res. Br. in Op. to Cert. 8. Thus, the complaint does not implicate any "independent, non-negotiable, state-imposed duty," *Lueck*, 471 U.S. at 217 n.11, but squarely addresses the relationship between these two private contractual agreements.[10] Because one of those

[9]Respondents complain that, under petitioners' view, they would have to plead and prove that their claims survive independently of the collective bargaining agreement (Br. 22). Respondents' concern is puzzling because that is precisely what they have pled (Compl. ¶ 29).

[10]We reiterate that all that is posed in this case is the question of private, consensual agreements. The issue of whether independent torts based upon independent state-imposed obligations are outside the scope of Section 301 is not before this Court, contrary to the suggestion of some of the *amici*. This case only involves private, waivable rights and the Court need go no further to resolve this case. See Pet. Br. 30-32 & n.20.

agreements is a collective bargaining agreement, under *Lueck*, resolution of respondents' claims depends upon the principles of Section 301. Pet. Br. 30-32.

Buttressed by the overriding federal labor policy of exclusive representation, Section 301 establishes the primacy of the collective bargaining agreement over other conflicting agreements. "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority."[11] *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 62 (1975). Section 301 provides the necessary authority to insure that the bargain struck by a labor organization is enforced as to *all* members of the unit—including those claiming rights superior to those enjoyed by the majority.

Respondents recognize that the scope of Section 301 is defined by *Lueck*. The distinctions drawn by respondents between this case and *Lueck*, however, are not persuasive (Br. 23-27).[12] As in this case, the plaintiff in *Lueck* sought to avoid Section 301 by relying on "independent" claims that his benefits were handled in bad faith. Holding that state law may not assume that a labor contract does not create any implied rights, this Court held that the plaintiff's claim was inextricably intertwined with the collective bargaining agreement and arose, if at all, under Section 301. 471 U.S. at 212-13, 220.

[11]The concern thus raised by respondents and their *amici* concerning the "encroachment" into state's rights is fallacious (*e.g.*, Brief for San Francisco Legal Aid Center at 5). To the contrary, the Ninth Circuit's approach allows state courts to encroach into areas Congress has determined are exclusively federal.

[12]The AFL-CIO virtually ignores *Lueck* (Br. 24 n.18). Apparently, the AFL-CIO is concerned that, as a result of a collective bargaining agreement, specific individuals may lose special rights. As we note in the text, that, however, is the result of the principle of majority rule which is at the heart of the federal labor laws.

It is exactly the same here. Respondents' conclusory characterization of their claims as "wholly independent of the collective bargaining agreement" is nothing more than an attempt to plead themselves outside the scope of Section 301, an attempt that *Lueck* explicitly rejects. *Id.* at 211. Under *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), moreover, the viability of respondents' individual agreements must be determined by a subsequently negotiated collective bargaining agreement. Whether respondents' alleged agreements survive as enforceable obligations is necessarily a federal question that turns—under *Lueck* and *J.I. Case*—upon the interpretation and provisions of the collective bargaining agreement.[13] Respondents' claims are, thus, necessarily rooted in the labor contract and properly recharacterized as Section 301 claims. The proper means for asserting such rights is under that Section, after exhausting the grievance-arbitration procedures, to provide the arbitrator the opportunity to determine whether respondents' claims are consistent, inconsistent or superfluous to the requirements of the labor agreement.[14]

Respondents and their *amici* also appear to suggest that the viability of their individual contracts under state law is the critical issue It is not; for it is the arbitrator who will decide such issues.

[13]Respondents miss the point of *J.I. Case*. *J.I. Case* leaves some room for individual contracts but, at the same time, establishes that such contracts cannot be inconsistent with a collective bargaining agreement. In short, *J.I. Case* establishes the primacy of collective bargaining agreements. The starting premise, therefore, is that the collective bargaining agreement controls and, from that premise, the determination is whether the collective bargaining agreement allows individual contracts to survive as part of the collective agreement. The latter issue, however, is an issue of federal law which must be resolved by an arbitrator. See Brief of Chamber of Commerce at 15-18.

[14]In addition to the conceded issue of the Union's and Caterpillar's negotiation of respondents' claimed individual rights (Res. Br. in Op. to Cert. 8), there are numerous contractual provisions involved in resolving respondents' claims. See Articles 8, 7.6 (defining seniority and service); Article 14 (procedure for downgrades and layoffs); Article 13.9 (termination pay); Article 13.10 (defining rights upon plant closure); Pet. Br. 5-6.

Thus, in order for petitioners to prevail, this Court need not determine the actual viability of the alleged independent contracts, although petitioners believe they are inconsistent with the labor agreement and, thus, invalid. See Pet. Br. 34-36.[15] See also *Belknap*, 463 U.S. at 506 ("individual contracts of employment must give way to otherwise valid provisions of the collective bargaining contract").[16] In this case, it suffices for the Court to find that the determination of the validity of respondents' claims is one for federal law to be made under the precepts of Section 301. See Brief for the Chamber of Commerce at 15-18. The case arises, therefore, under Section 301 and, as such, was properly removed and dismissed with leave to plead the requirements of Section 301.

B. Once The Federal Court Determines That A Claim Is Within The Scope Of Section 301, It Is Obliged To Enforce The Contractual Grievance-Arbitration Procedures.

The federal labor laws' fundamental preference for arbitration is also furthered by Section 301. "The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour* [that state law cannot be utilized to enforce collective bargaining agreements]." *Lueck*, 471 U.S. at 219. Regardless of how individual states choose to expand or constrict individual employment contract rights for em-

[15]Some *amici* assert that respondents do not seek "better benefits." Brief for San Francisco Legal Aid Center at 25. Yet that is precisely what they seek. Respondents seek rights upon plant closure over and above those provided in the collective bargaining agreement.

[16]*Belknap* correctly noted that certain breach of contract suits do not fall within the jurisdiction of the National Labor Relations Board. 463 U.S. at 506. Thus, had such a claim been asserted here, it would not necessarily fall within the scope of the National Labor Relations Act.

ployees not covered by a collective bargaining agreement,[17] federal labor policy requires uniform application of and deference to labor arbitration for employees covered by collective bargaining agreements.[18]

Respondents contend that, because there allegedly are "no provisions of the collective bargaining agreement to which [they] can point and upon which they can stand," and because their local union declined to process the grievance they did file, this case cannot fall within the parameters of Section 301 (Br. 26, 32). As the AFL-CIO's silence on this issue indicates, this conclusory assertion is belied by the language of the collective bargaining agreement, which entertains grievances as to "any difference" between the Company and an employee as to "wages . . . hours of work *or* working conditions covered by the Agreement." Cert. Pet. 65A. Further, a local union's arguable breach of its duty of fair representation hardly is a basis for saying a grievance is outside the scope of the contractual procedures. More important, respondents' contention rests on the faulty premise that a specific provision of the collective bargaining agreement must cover their claims to make them grievable or arbitrable. *AT&T Technologies, Inc.* v. *Communication Workers*, 106 S. Ct. 1415 (1986), however, sets out precisely the opposite approach. Under *AT&T*, all disputes even "arguably" within the scope of the grievance-arbitration clause must be processed thereunder and the question

[17]As respondents and their *amici* note, the law of implied contracts varies from state to state. This wide variation of state laws creates precisely the uncertainty and inconsistency that federal labor law is designed to prevent. Whatever avenues of redress the states choose to provide for employees not covered by a collective bargaining agreement, for those employees so covered it is imperative that arbitration be the sole avenue of redress.

[18]The AFL-CIO correctly observes that petitioners' argument is not based simply on the respondents' reentry into the unit (AFL-CIO Br. 25 n.19). The critical fact, for Section 301 purposes, is the execution of the collective bargaining agreement on their behalf by their exclusive bargaining representative, IAM Local Lodge No. 284.

for the federal court is whether the dispute is specifically excluded from the grievance-arbitration provision. *Id.* at 1419. If there is no specific exclusion, the question of arbitrability is for the arbitrator to decide. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (disputes are grievable unless it can be said with "positive assurance" they are not). If the decision is for the arbitrator, then it is a Section 301 case.

Respondents contend, however, that they would not prevail in arbitration. But the issue before the federal court is not whether respondents would prevail in arbitration; that issue is a question for the arbitrator who has the power to award or deny relief based upon the contract being interpreted and the other evidence before him.[19] Although this is not a suit to compel arbitration, were it such a case the narrow issue before the federal court would be whether the dispute is specifically excluded from arbitration. Not only is the contract dispute herein not excluded, but it lies at the very heart of the provisions of the collective bargaining agreement dealing with rights upon plant closing. See Pet. Br. 34 and *supra* n. 14.

[19]See *Braniff, Inc.*, 84 Lab. Arb. (BNA) 1270 (1985) (White, Arb.) (individual agreement unenforceable because it violated the collective bargaining agreement); *Baker Marine Corp.*, 84 Lab. Arb. (BNA) 627 (1985) (Marlatt, Arb.) (employer's letter to union formed part of collective agreement); *Schnadig Corp.*, 83 Lab. Arb. (BNA) 61 (1984) (Traynor, Arb.) (settlement agreement between employee and employer invalid); *Formosa Plastics Corp.*, 79 Lab. Arb. (BNA) 1205 (1982) (Taylor, Arb.) (considering past practice as forming contractual agreement); *Union Oil Co.*, 81 Lab. Arb. (BNA) 540 (1984) (Richman, Arb.) (claim that employer letter constituted enforceable agreement arbitrable); *Hayssen Mfg. Co.*, 82 Lab. Arb. (BNA) 500 (1984) (Flaten, Arb.) (representation in employee handbook formed part of parties' agreement); *Armco, Inc.*, 79 Lab. Arb. (BNA) 330 (1982) (Wren, Arb.) (oral promise by supervisor unenforceable because of conflict with collective bargaining agreement); *U.S. Pipe & Foundry Co.*, 54 Lab. Arb. (BNA) 820 (1970) (Jones, Arb.) (supervisor's promise of extra pay to individual employee enforced); *Dempster Bros., Inc.*, 69-1 Lab. Arb. Awards (CCH) ¶ 8194 at 3668, 3670 (1968) (Cantor, Arb.) (individual agreement enforceable by grievance procedures as part of collective bargaining agreement).

This nation's labor policy has been built on the congressional mandate that claims relating to collective bargaining agreements be resolved under uniform principles of federal law. Respondents would have this Court retreat from these fundamental principles. Such a retreat, particularly based on the rather common fact pattern of this case, would generate conflicting results in the enforcement of collective bargaining contracts depending upon the peculiarities of individual states. These conflicts are anathema to the basic labor law principles established by Congress and to the Section 301 removal principles of *Franchise Tax Board* and *Avco*. Far from asking this Court to "take a new direction" (Res. Br. 34), petitioners urge this Court to reconfirm these basic principles and reverse the judgment of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be reversed and the case remanded with instructions to dismiss the complaint as preempted by Section 301.

Respectfully submitted,

GERALD D. SKONING*
CHARLES C. JACKSON
J. STEPHEN POOR
CHRISTOPHER A. WEALS
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Of Counsel:

THEODORE R. JOHNSON
NANCY L. SNOWDEN
Caterpillar Inc.
100 Northeast Adams Street
Peoria, Illinois 61629
(309) 675-4278

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Petitioners

April 1, 1987

**Counsel of record*

AMICUS CURIAE

BRIEF

No. 86-526

JAN 16 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A.E. MATHISEN and KEITH WHEELER,

Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE and JOEL BRYAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL *
GAREN E. DODGE
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae in support of Petitioners. The parties' written consents to file this brief have been filed with the clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the

general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the fields of labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of collective bargaining agreements and equal employment policies and requirements. EEAC's members are committed firmly to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various equal employment and labor laws, including the Labor Management Relations Act (LMRA), 29 U.S.C. § 141, *et seq.* (1978), which, among other things, permits suits for violation of employment contracts to be brought in federal court, 29 U.S.C. § 185(a) (Section 301), and which, in effect, serves to preempt state court suits arising out of employment relationships governed by collective bargaining agreements. *See Franchise Tax Board v. Construction Laborers Vac. Trust*, 463 U.S. 1, 23-24 (1983). Many EEAC members are signatories to collective bargaining agreements which contain grievance and arbitration procedures like those contained in the Caterpillar Inc. (Caterpillar) contract. Moreover, EEAC members conduct business in virtually all states, and are subject to wrongful discharge suits which are potentially resolvable under grievance and arbitration procedures, and thus possibly preempted by federal law. Thus, EEAC has a direct interest in the issue presented in the instant case—whether a plaintiff's state court wrongful discharge and employment contract suit, which is arbitrable under a collective bargaining agreement, is presumptively preempted under Section 301 of the LMRA, and therefore removable to the federal courts, even though the plaintiff artfully pleads his claim to avoid federal jurisdiction.

Because of its interest in the application of the nation's employment laws, EEAC has filed briefs as amicus curiae in many cases before the United States Supreme Court. Of particular relevance here, EEAC has filed briefs regarding the interrelationship between state and federal laws, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA preemption); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (Title VII res judicata); and the interpretation of collective bargaining agreements, *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (Title VII back pay and seniority); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (Title VII and a seniority system); *IUE, Local 790 v. Robbins & Meyers*, 429 U.S. 229 (1976) (Title VII and a grievance limitations period). In addition, the National Foundation for the Study of Equal Employment Policy, the educational foundation associated with EEAC, recently published a monograph entitled *Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court's Decision on Wrongful Discharge Suits and Other State Court Employment Litigation* (1986).

STATEMENT OF THE CASE

Cecil Williams, the plaintiff below, was a member of the collective bargaining unit for the first eleven years of his employment with Caterpillar; he then spent several years in positions outside the unit; and, finally, he returned to the unit for the last five years of employment. He alleged that while working outside the unit, Caterpillar told him that if the plant were closed and his work were satisfactory, he would be allowed to transfer to other Caterpillar facilities or related subsidiaries. The collective bargaining agreement covering Williams during his final years of employment, however, provided

that: (1) employees could be discharged for just cause; (2) Caterpillar would decide where work was to be performed; (3) if the plant were to be closed, employees could transfer to new locations under certain conditions; and (4) any disputes would be resolved by binding arbitration. Under the terms of the collective bargaining agreement, Williams was laid off when the plant was closed, receiving severance pay and extensive benefits.

Relying upon the alleged promises that he would be transferred, Williams sued in the California Superior Court, claiming breach of an employment contract, breach of a covenant of good faith and fair dealing, intentional infliction of emotional distress and fraudulent misrepresentation, all state law claims. He based these claims upon an alleged "individual" employment contract and did not allege federal Section 301 claims of breach of the collective bargaining agreement. Caterpillar sought to remove the case to federal court, asserting federal jurisdiction on the basis that the state suit was preempted by federal law, Section 301 of the LMRA.

The United States District Court for the Northern District of California held that removal to federal court was proper because the suit would involve not only the alleged individual contract, but also the collective bargaining agreement, which was governed by Section 301. The United States Court of Appeals for the Ninth Circuit, however, reversed the district court. It ruled that if a plaintiff only alleges state claims and avoids seeking any federal remedy, the case cannot be removed to federal court, even if the employer can mount a successful federal preemption defense. Distinguishing this Court's holdings in *Franchise Tax Board* and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Ninth Circuit concluded that since Williams' "complaint cannot be construed to allege a cause of action remedied by federal law, the district court did not have jurisdiction to consider the preemption defense or to dismiss the action." 786 F.2d 928, 937.

SUMMARY OF ARGUMENT

This Court, in interpreting the Congressional intent behind Section 301 of the LMRA, has recognized a strong national policy of enforcing collective bargaining agreements. That policy strongly favors grievance and arbitration of a labor contract dispute "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). The policy applies with full force where, as here, a state claim under an alleged "individual" contract is clearly arbitrable, for to permit otherwise would "allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract." *Allis-Chalmers* at 211.

The same Congressional policy that created this "presumption of arbitrability" should create a presumption that Section 301 preempts state labor contract claims. Such a presumption is fully consistent with, and is in fact suggested in, the decisions of this and other courts. For example, *Allis-Chalmers* made clear that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted). Similarly, *Franchise Tax Board* stressed this Court's particular preference for federal preemption in the labor contract field: "the preemptive force of § 301 is so powerful as to . . . completely pre-empt[] a state cause of action" such that "any state action . . . would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law." 463 U.S. at 23-24.

Such a presumption is especially important where, as here, a plaintiff covered by a collective bargaining agree-

ment alleges unfair discharge, and where the claim is based upon an alleged "preexisting" contract, because adjudication of such a claim necessarily requires reference to, and interpretation of the collective bargaining agreement. *Bale v. General Telephone Co. of California*, 795 F.2d 775, 779 (9th Cir. 1986); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1474 (9th Cir. 1984). For although an individual employment contract may coexist with a collective bargaining agreement, the latter must prevail to the extent that there may be any inconsistencies between the two. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-339 (1944). Hence, federal preemption is compelled in these circumstances to preserve the policy of uniform federal law interpretation of labor contracts. *Eitmann v. New Orleans Public Services, Inc.*, 730 F.2d 359, 366 (5th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984).

Where a federal cause of action preempts a state clause of action, "any complaint that comes within the scope" of the federal claim is removable to the federal courts. *Id.* And it is clear that such a claim is removable despite a plaintiff's attempts to "artfully plead" only state issues, especially where, as here, the claim falls under the "powerful[ly] preemptive force" of Section 301. *Franchise Tax Board* at 23.

Clear policy reasons favor this presumption of preemption and removal, despite a plaintiff's artful attempts to plead only state law. For example, such a presumption would reduce the problem of overlapping and inconsistent remedies, and would support a uniform body of federal law. Just as importantly, such a rule would enforce the parties' intent at the time they negotiated the collective agreement, and thus preserve the central role of arbitration in our system of industrial self-government. Finally, a presumption of preemption would discourage deceptive pleadings in the state courts, and thereby reduce the already excessive backlog of cases.

ARGUMENT

I. WHERE A PLAINTIFF'S STATE LABOR CONTRACT CLAIM IS ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, THE STRONG NATIONAL POLICY OF ENFORCING COLLECTIVE AGREEMENTS REFLECTED IN SECTION 301 CREATES A PRESUMPTION OF FEDERAL PREEMPTION, AND THEREFORE OF REMOVAL FROM STATE JURISDICTION, WHICH CANNOT BE EVADED BY ARTFUL PLEADING

A. Introduction

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219-220 (1985), this Court stated unequivocally the preference for an arbitrator, not a state court judge, to resolve an unfair discharge claim arising in the context of a collective bargaining agreement through grievance procedures defined in that agreement, even if the discharge claim is framed entirely in terms of state law. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

This Court, in *Franchise Tax Board v. Construction Laborers Vac. Trust*, 463 U.S. 1, 23-24 (1983), stressed its particular preference for federal preemption and removal in the labor contract field: "the preemptive force of § 301 is so powerful as to . . . completely preempt[] a state cause of action" such that "any state action . . . would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law."

The Ninth Circuit below clearly misunderstood the law's preference for federal preemption and removal

under Section 301, especially where a plaintiff attempts to define the terms of employment without using the collective bargaining agreement. As we show below, Section 301 reflects a strong national policy of enforcing collective agreements, a policy that should create a presumption of complete preemption. When a federal cause of action preempts a state claim, the claim is then removable, and a court should not be misled by a plaintiff's artful drafting of the complaint so as to keep the action in the state courts. Finally, we show that cogent policy reasons support such an analysis, and that if the Ninth Circuit's decision is allowed to stand, the strong national labor policy, carefully established by this and other courts, will be undermined.

B. Section 301 Reflects A Strong National Labor Policy Of Enforcing Collective Bargaining Agreements, Especially With Respect To Arbitrable Claims

Section 301 states that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court . . . having jurisdiction. . . ." It "reflects a Congressional intent to promote industrial peace by ensuring uniform application of federal law to the enforcement of collective bargaining agreements." *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 361 (5th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984), citing *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). This congressional intent is the "ultimate touchstone," *Allis-Chalmers* at 208, and is the force behind our strong national policy of enforcing labor agreements.

As this Court stated in *Lincoln Mills*, Section 301 embodies a "'[s]tatutory recognition of the collective agreement as a valid, binding, and enforceable contract . . . [which] will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.'" *Id.* at 454, quoting

S. Rep. No. 105, 80th Cong., 1st Sess., p.17. *Lincoln Mills* explained: "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, [. . . Section 301] expresses a federal policy that federal courts should enforce these agreements . . . and that industrial peace can be best obtained only in that way." *Id.* at 455.

This grievance and arbitration process, contained in most labor contracts and fully available to Williams in the instant case, was described by this Court as:

> [A]t the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement . . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). Arbitration is appropriate "unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83 (emphasis added).

This "federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure . . ." before filing a lawsuit. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis in original). This is true because "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the

plant." *Id.* at 653. The reasoning underlying the exhaustion requirement was explained as follows:

> *A contrary rule which would permit an individual employee to completely sidestep available grievance procedures* in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, *it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.* If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

Id., quoting Local 174, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (emphasis added).

This strong federal labor policy was recently reaffirmed in *Allis-Chalmers Corp. v. Lueck*, where the Court noted that "if the policies that animate § 301 are to be given their proper range, [. . . it] must extend beyond suits alleging contract violations." *Id.* at 210. The Court explained:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. *Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.* Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Id. at 211 (emphasis added) (footnote omitted). *See Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589, 590 &

n.1 (6th Cir. 1986); *Manning v. Boulton*, 678 F.2d 13, 15-17 (3d Cir. 1982); *O'Neill v. Epic Power Services, Inc.*, 620 F. Supp. 32, 35 (D.C. Ga. 1985) ("[w]hen a worker arguably bound by a collective-bargaining agreement asserts an individual employment contract as the basis for a lawsuit, issues going to the heart of national labor policy arise, for the strength of our labor policy lies in its emphasis on collective efforts rather than individual action.").

In short, it is clear that the Ninth Circuit below merely paid lip service to this Court's long line of cases explaining the strong national labor policy of enforcing collective bargaining agreements, 786 F.2d at 935-937, choosing to disregard that judicial policy and the congressional intent behind the policy. For example, the court obviously did not view the arbitration process as "at the very heart" of the system of self-governance at the Caterpillar facility, *Warrior & Gulf* at 581, and the court clearly did not resolve doubts regarding arbitrability "in favor of coverage." *Id.* at 582-83. Just as importantly, the court clearly was not concerned that "sidestep[ing] available grievance procedures" would "deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances," *Republic Steel* at 653, or that Williams may have been attempting to "evade the requirements of § 301 by relabeling [his] contract claims," *Allis-Chalmers* at 211.

More specifically, it is obvious that the instant dispute could have been resolved under the grievance and arbitration provisions of the collective bargaining agreement if Williams had so chosen. That provision defines a grievance as "any difference which may arise between the parties."[1] Yet, after conceding that "[e]ven some

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[1] A grievance under Article 10.1 of the contract is defined as follows:

> "A grievance is defined to be any difference which may arise between the parties, or between the Company and an em-

reference to the collective bargaining agreement is required," the court still found that "that alone is not sufficient to transform a case into one that 'arises under' § 301." *Id.* at 936. This certainly conflicts with *Warrior & Gulf's* ruling that arbitration is appropriate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and that doubts "should be resolved in favor of coverage." *Id.* at 582-83.

Significantly, the Ninth Circuit below improperly found that the arbitration clause in the Caterpillar collective bargaining agreement did not "pull the plaintiffs' action within the scope of § 301." 786 F.2d at 936 n.4. In so finding, the court reasoned that the instant case "involves entirely separate and independent agreements which are not within the scope of the collective bargaining agreement." *Id.* Furthermore, the Ninth Circuit reasoned that the "arbitration clause in the bargaining agreement expressly limits the duty to arbitrate to matters 'covered by the Agreement' or involving the application or interpretation 'of any provisions of this Agreement.'" *Id.* "Consequently, the bargaining agreement arbitration clause, by its own terms, is limited to disputes arising under the agreement, and does *not* cover matters collateral to the agreement, such as independent individual contracts." *Id.* (emphasis in original).

Clearly this reasoning is without merit, and in fact conflicts with this Court's reasoning in *Allis-Chalmers*. The arbitration clause at issue in *Allis-Chalmers* covered "any insurance-related issues that may arise from provisions of the [Collective Bargaining] Agreement," *id.* at 204, yet this Court found that Lueck was obligated to

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ployee covered by this Agreement as to: (a) Any matter involving wages (except general wage adjustments) hours of work, or working conditions covered by the Agreement, or (b) any matter involving the application or interpretation of any provisions of this Agreement."

grieve his so-called "independent claim" or have it "dismissed as preempted." *Id.* at 220. Surely the Caterpillar and Allis-Chalmers arbitration clauses are similar enough to warrant arbitrability. Moreover, as this Court made clear, a state court's "assumption that the labor contract creates no *implied* rights is not one that state law may make. Rather, it is a question of federal contract interpretation . . .," *id.* at 202 (emphasis added), and it is an issue that the federal courts should resolve.

Clearly, therefore, the strong national labor policy makes Williams' claim susceptible to arbitration, and this Court thus must not allow the Ninth Circuit to eviscerate Section 301 and the national policy of enforcing collective agreements with its contrary rulings. Instead, as explained fully below, this Court should affirm those national labor precepts by overturning the decision of the Ninth Circuit.

C. The National Policy Of Enforcing Collective Bargaining Agreements Should Create A Presumption That Section 301 Preempts State Claims Involving A Labor Contract

As established above, Section 301 reflects a strong national policy of enforcing collective bargaining agreements. As we now show, this policy, in turn, should create a presumption that Section 301 preempts state claims. Of course, not all state court suits will be *in fact* preempted, but where an employee covered by a collective bargaining agreement attempts to defeat removal, it should be incumbent upon that employee to show "with positive assurance" that the arbitration clause is not susceptible of an interpretation that covers the dispute. *See Warrior & Gulf* at 582-83.

This Court discussed the "presumption of arbitrability" established by *Warrior & Gulf* most recently in *AT&T v. Communications Workers*, 106 S.Ct. 1415, 1419 (1986). Noting that this presumption applies "unless it

may be said with positive assurance" that the dispute is not covered by the arbitration clause, the Court explained the continued vitality of strong federal labor interests:

> These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

Id. at 1418.

Like this "presumption of arbitrability," a similar "presumption of preemption" is suggested in a series of cases, including *Allis-Chalmers*. That case noted that courts must again examine congressional intent, the "ultimate touchstone," *id.* at 208, quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), to determine whether state law would "frustrate the federal labor-contract scheme established in § 301." *Allis-Chalmers* at 209. In this regard, *Allis-Chalmers* then relied upon *Lucas Flour*, the first case to analyze the preemption doctrine, and which held that "incompatible doctrines of local law must give way to principles of federal labor law." *Id.* at 102. After noting that "[t]he dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute," and that "issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy," *id.* at 103, *Lucas Flour* stated that:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area . . ., we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Id. at 104 (citations omitted).

In extending the reasoning of *Lucas Flour*, *Allis-Chalmers* stated: "If the policies that animate § 301 are to be given their proper range, however, the preemptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210. Stressing the need for a uniform federal common law and a central role of arbitration, the Court observed that:

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, *the arbitrator's role in every case could be bypassed easily if Section 301 is not understood to pre-empt* such claims. *Claims involving* vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness . . ., as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. at 219-20 (emphasis added). The Court concluded by holding "that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . .

or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).[2]

This Court, in *Franchise Tax Board*, further stressed the special need for preemption in the labor field. In explaining the difference between "complete" premption in Section 301 cases like *Avco Corp. v. Aero Lodge No. 375*, 390 U.S. 557 (1968), and preemption under other federal laws like ERISA, the Court stated that "*any* action to enforce an agreement within the *scope* of § 301 would be controlled by federal law." 463 U.S. at 23, citing *Lucas Flour Co.*, 369 U.S. at 103-104 (emphasis added).[3] The Court elaborated "that the preemptive force

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[2] While *Allis-Chalmers* did not explicitly adopt a presumption of preemption, such a presumption is fully consistent with its holding and reasoning. The Court stated that "[t]he full scope of the preemptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." *Id.* at 220. A presumption that a labor contract claim is preempted would certainly be consistent with this dictum—whether the claim is *in fact* preempted would be determined if the plaintiff defeats the presumption.

[3] While *Franchise Tax Board* did not fully define complete preemption, this Court clearly meant it to encompass Section 301 causes of action. *Id.* at 23. *See* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 662-67 (1984) ("[T]he 'complete preemption' of which the *Franchise Tax Board* Court speaks highlights a peculiarly powerful federal interest in the operative substantive law."). Clearly Section 301 constitutes complete preemption despite the dictum in *Franchise Tax Board* that "a state battery suit growing out of a violent strike would not [be preempted] under § 301 simply because the strike may have been a violation of the employer-union contract." 463 U.S. at 25 n.28. Clearly, the distinction is that state damage suits involving threats of violence traditionally have not been preempted since they are covered by state criminal laws. *See Youngdahl v. Rainfair*, 355 U.S. 131, 139 (1957); *see also* S. Kinyon and J. Rohlik, *"Deflouring" Lucas Through Labored Characterizations: Tort Actions of Unionized Employees*, 30 St. Louis U.L.J. 1, 32 (1985). As explained in Argument D below, this complete preemption makes the claim removable to the federal courts.

of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" 463 U.S. 1, 23, citing *Avco* at 560. *See Oglesby v. RCA Corp.*, 752 F.2d 272, 277 (7th Cir. 1985) ("The state law in cases necessarily rooted in Section 301, LMRA has been completely preempted.").

The Ninth Circuit below, in denying preemption, erroneously ignored this Court's holdings in *Allis-Chalmers* and *Franchise Tax Board*. Specifically, the court below found that a "state law cause of action has been 'completely preempted' when federal law both displaces *and* supplants the state law—that is, when federal law provides both a superseding remedy replacing the state law cause of action *and* preempts that state law cause of action." 786 F.2d at 932 (emphasis in original). First, in so holding, the court relied "generally" on its own decision in *Hunter v. United Van Lines*, 746 F.2d 635, *cert. denied*, 106 S.Ct. 180 (1985), a case that involves a simple damage claim under the Carmack Amendment, 49 U.S.C. § 11707 (1981), and which thus fundamentally ignores this Court's special treatment of the "powerful" preemption in the labor field.

More importantly, the Ninth Circuit specifically referred to its "superseding remedy" requirement as "consistent" with this Court's analysis of *Avco* in *Franchise Tax Board*, 786 F.2d at 932 n.2. In *Franchise Tax Board*, however, this Court stated:

> The Court of Appeals [in *Avco*] held . . . and we affirmed . . . that *the petitioner's action "arose under" § 301*, and thus could be removed to federal court, *although the petitioner* had undoubtedly pleaded an adequate claim for relief under the state law of contracts and *had sought a remedy available only under state law*. The necessary ground of decision was that the preemptive force of § 301 is so

> powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization."

Id. at 23 (some emphasis added) (citations omitted). Clearly, therefore, this Court does not define "complete preemption" as requiring an alternative federal remedy.

A rule favoring a presumption of preemption would, in fact, be supported by two other decisions in the Ninth Circuit. In *Bale v. General Telephone Co.*, 795 F.2d 775, 779 (9th Cir. 1986), the same circuit that decided *Williams* herein stated that "[a]ny suit for breach of the individual employment contracts [that is inconsistent with a collective agreement] would therefore fall within the preemptive scope of Section 301." The court reasoned that, like *Allis-Chalmers*, the "adjudication of their state tort claims would require reference to, and interpretation of, the terms of the collective bargaining agreement." *Id.* at 780. Similarly, in *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1474 (9th Cir. 1984), the Ninth Circuit stated that "any independent agreement of employment could be effective only as a part of the collective bargaining agreement." The Ninth Circuit in *Williams* below clearly erred in attempting to distinguish *Olguin* by stating that the plaintiff in *Olguin* had "always been a member of the bargaining unit," 786 F.2d at 936 n.6, while Williams had made his individual contract while outside the unit. Such a distinction is untenable. For example, the court in *Clinch v. Montana AFL-CIO*, 633 F. Supp. 872, 875 (D. Mont. 1986), held that an employee outside of the unit had a "relationship which was governed by Section 301" simply by voting in favor of union representation and by signing a letter of union recognition. Clearly, the Ninth Circuit's decision in *Olguin* was not sufficiently distinguished by the court below, and the decisions in *Bale* and *Olguin* in fact provide a reasoned basis for a presumption of preemption.

This presumption of federal preemption is particularly important when the claim involves an allegation of unfair discharge, as does Williams' claim herein. First, *Allis-Chalmers* specifically mentioned that unfair discharge claims should be preempted. Second, unlike a claim involving, for example, worker's compensation or state health standards, which involve entirely different types of non-contract issues, unfair discharge claims require, at a minimum, *reference* to the agreement. *See Bale* at 780; *Costello v. United Parcel Service, Inc.*, 617 F. Supp. 123, 126 (D.C. Pa. 1984).

Similarly, a presumption of preemption is crucial where as here, a plaintiff's claim does not invoke the collective bargaining agreement, but rather alleges a preexisting contract. In *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), this Court established that, while individual contracts between an employer and an employee are not precluded by the existence of a collective bargaining agreement, to the extent that an individual contract and a collective bargaining agreement are inconsistent, the latter must prevail. *Id.* at 337-39. The Court held inconsistent with a collective bargaining agreement any individual contract by which the employer would "incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by the collective agreement." *Id.* at 339. In doing so, the Court noted that the "practice and philosophy of collective bargaining looks with suspicion on such individual advantages." *Id.* at 338. More recently, this Court in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), stated that "[national labor] policy . . . extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees . . . . Thus, only the union may contract the employee's terms and conditions of employment. . . ."

These cases were cited and found to be dispositive in *Eitmann*, a Fifth Circuit case very similar to the case herein. In that case, the plaintiff alleged that he entered into an individual employment contract before he became a member of the bargaining unit, and that his individual contract was entirely unrelated to the bargaining agreement and outside the scope of bargaining unit. 730 F.2d at 360, 362-63. Like Williams, the plaintiff in *Eitmann* alleged that his preexisting independent contract "provided, essentially, for lifetime employment," regardless of "the terms of the collective bargaining agreement," which was in effect during the same period of time. 730 F.2d at 362-63.

The Fifth Circuit, citing the particularly powerful force of Section 301 explained in *Avco* and *Franchise Tax Board*, nonetheless found for the employer. It held that a "court must *necessarily* be guided by the substance rather than the form of the complaint," *id.* at 366 (emphasis added), explaining that "to limit our inquiry to the face of the complaint would unduly hamper the policy underlying Section 301," *id.* at 367. Clearly, therefore, a plaintiff's claim based upon a preexisting contract cannot survive this Court's holdings in *J.I. Case* and *NLRB v. Allis-Chalmers*, and the reasoning of the Fifth Circuit certainly is more persuasive than that of the Ninth Circuit below.

As a result, Section 301 and the national labor policy clearly favor a presumption of preemption, leaving the plaintiff the obligation to defeat the presumption by showing "with positive assurance" that the dispute is not arbitrable. This Court is urged to adopt such a rule.

D. Where A Federal Cause Of Action Preempts A State Cause Of Action, The Claim Is Removable

28 U.S.C. § 1441 (1982) permits a defendant to remove "any civil action brought in a State court of which the district courts of the United States have original

jurisdiction." Original jurisdiction exists in civil actions "arising under" federal law. 28 U.S.C. § 1331 (1982). In *Franchise Tax Board*, this Court stated unequivocally that removal jurisdiction exists if a federal cause of action completely preempts a state cause of action:

> *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action[,] any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law [and is thus removable under 28 U.S.C. § 1441].

463 U.S. at 23-24. This Court concluded that it "may be that, as with § 301 as interpreted in *Avco*, *any* state action coming within the *scope* of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law." 463 U.S. at 24 (emphasis added).

The Ninth Circuit below clearly erred in holding that "[a]n action 'arises under' federal law [and is therefore removable] only if 'resolution of the federal question must play a *significant* role in the proceedings.'" 786 F.2d at 931 (emphasis added), citing *Hunter*, 746 F.2d at 646. First, as noted above, *Hunter* did not involve preemption and removal under Section 301, and obviously does not reflect this Court's special treatment of labor preemption. *See Franchise Tax Board* at 23-24. More importantly, *Franchise Tax Board* stands for the proposition that *any* action within the *scope* of Section 301 is controlled by federal law and is thus removable, *id.*, not that a "resolution of the federal question must play a *significant* role in the proceedings," 786 F.2d at 931 (emphasis added). Clearly, therefore, the Ninth Circuit's reference to *Hunter* as the "most important recent case" and *Hunter*'s analysis regarding preemption re-

moval as "the proper approach," *id* at 934, 935 compels reversal.[4]

E. A Plaintiff's Cause Of Action Must Be Removable Despite Artful Attempts To Plead Only State Issues

The Ninth Circuit below misapplied the general rule that a plaintiff is the "master" of his complaint, and that the "well-pleaded complaint" rule stands for the proposition that whether a case is federal must be determined from the face of that complaint. 786 F.2d at 931; *see Franchise Tax Board* at 22. Similarly, the court below clearly erred in failing to recognize Williams' "artful pleading" to "cloak the nature of his claim." *Eitmann* at 365.

The "artful pleading" doctrine essentially holds that a plaintiff may not defeat removal by "artfully" omitting to plead essential federal issues in the complaint. Where the plaintiff so pleads, courts will look beyond the face of the complaint to determine its true nature, and remove it to the federal courts "despite the absence of a federal issue on the face of the complaint." *Eitmann* at 365. Essentially, "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), quoting 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3722 at 564-66 (1976).

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[4] The Ninth Circuit also erred in denying federal jurisdiction, and therefore removal, because Caterpillar's preemption claim was a "defensive" allegation. *See* 786 F.2d at 932, 936 & n.5. Clearly, *Franchise Tax Board* held to the contrary when it stated that "as with § 301 as interpreted in *Avco*, any state action . . . would be removable to federal district court, even if an otherwise adequate state court cause of action were pleaded without reference to federal law." *Id.* at 24. *See Eitmann* at 365-66 (rejecting the argument that preemption is a defensive allegation where "the preemptive force is . . . federal labor law. We think that this distinction is determinative.").

Courts are especially prone to look beyond the face of an artfully pleaded complaint in the labor area. The Ninth Circuit, the same Circuit that incorrectly decided the instant case, explained:

> To escape th[e] exclusivity [of grievance and arbitration procedures contained in their collective bargaining agreements,] employees frequently attempt to avoid federal law by basing their complaint on state law, disclaiming any reliance on the provisions of the collective bargaining agreement. Nevertheless, many of these cases are in fact Section 301 suits and as such are governed by federal law. In such cases the 'artful pleading" doctrine requires that the state law complaint be recharacterized as one arising under the collective bargaining agreement. The case may then be removed to federal court and adjudicated under the appropriate federal law.

Olguin at 1472. The Ninth Circuit in *Olguin* concluded, much unlike the court below, that "in determining whether a complaint is 'artfully pleaded', the court is not bound to consider only the facts pleaded in the complaint but may look *elsewhere* to ascertain facts that would appear in a 'well pleaded' complaint." *Id.* at 1473 (emphasis added).[5]

Even more persuasively, the Fifth Circuit in *Eitmann* examined this Court's special treatment of state actions

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[5] Specifically, the court below, citing *Hunter*, called the artful pleading doctrine a "narrow exception . . . to be invoked only in exceptional circumstances." 786 F.2d at 931 n.1. In doing so, the court distinguished *Olguin* by stating that Olguin's claim "was 'in reality' an allegation of a breach of the bargaining agreement." *Id.* Clearly this analysis begs the question since that is precisely what the artful pleading doctrine is designed to do—discover the "real" nature of the complaint. In addition, the court's citation of *Hunter*, a non-labor case, is inappropriate given the especial need to examine plaintiffs' state claims where a collective bargaining agreement applies.

that come within the scope of Section 301, noting that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." *Franchise Tax Board* at 23, citing *Avco* at 560. Noting that it would "unduly hamper the policy underlying Section 301" to "limit [its] inquiry to the face of the complaint," the court held:

> We think that *Avco* and its progeny are persuasive with regard to the issue before us. Therefore, we hold that, where a state cause of action is preempted by Section 301, the federal courts have original subject matter jurisdiction over the action despite the absence of a federal claim on the face of the complaint. In such a case, which raises the spectre of "artful pleading," the court must necessarily be guided by the substance rather than the form of the complaint.

730 F.2d at 366. *See also Taylor v. General Motors Corp.*, 763 F.2d 216, 220 (6th Cir. 1985), *cert. granted sub nom.*, 106 S.Ct. 1182 (1986) ("[W]here an employee in a labor case attempts to assert a common law cause of action against his employer . . . regardless of the wording of the complaint it is clear that the claim must necessarily arise under federal law. Any attempt by the plaintiff to circumvent federal labor law is merely a practice in artful pleading.").

Clearly the court below erred in failing to recognize Williams' attempt to artfully plead his claim to avoid federal jurisdiction. While this Court need not find that Williams attempted to artfully plead his claim to assert federal jurisdiction, a finding of artful pleading would provide an *additional* basis for removal. At minimum, the Ninth Circuit's specific failure to rely on Section 301 preemption cases in favor of *Hunter* constitutes clear error. Accordingly, this Court is requested to reverse the decision of the court below.

II. COGENT POLICY REASONS SUPPORT A PRESUMPTION OF PREEMPTION AND REMOVAL DESPITE A PLAINTIFF'S ARTFUL ATTEMPTS TO PLEAD ONLY STATE LAW

Several policy reasons support a presumption of preemption and removal despite a plaintiff's artful attempts to deny employers a federal forum. First, a rule favoring preemption will serve to "reduce the problem of overlapping and inconsistent remedies for alleged unfair discharge actions." R. Williams and T. Bagby, *Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court's Decision on Wrongful Discharge Suits and Other State Court Employment Litigation* (National Foundation for the Study of Equal Employment Policy 1986) at 62. Certainly, the Ninth Circuit's rule favoring adjudication in the various state courts would have the "disruptive influence" warned against in *Lucas Flour* at 103, leading to the "demise of a uniform national labor policy and the rise of fifty individual labor laws." 30 St. Louis U.L.J. at 45. As this Court stated in *Allis-Chalmers*, "[e]xclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.'" 471 U.S. at 211, citing *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962).

In addition, as this Court stated in *Allis-Chalmers* at 211, if state law were used to determine the parties' intent in adopting a particular contract phrase or term, "all the evils addressed in *Lucas Flour* would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances." Consequently, "it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Id.*

An additional reason for "holding that Congress intended § 301 to pre-empt this kind of derivative tort claim" was stated well in *Allis-Chalmers*, that "only that result preserves the central role of arbitration in our 'system of industrial self-government.'" *Id.* at 219, quoting *Warrior & Gulf* at 581. If Williams, like Lueck, "had brought a contract claim under § 301, he would have had to attempt to take the claim through the arbitration procedure established in the collective-bargaining agreement before bringing suit in court." 471 U.S. at 219. *Allis-Chalmers* explained:

> Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the court's holding in *Lucas Flour* . . . The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is preempted, their federal right to decide who is to resolve contract disputes will be lost.

Id. (citations omitted).

The *Allis-Chalmers* reasoning applies with special force where, as here, the plaintiff artfully pleaded his claim to avoid federal jurisdiction. As this Court stated, "[s]ince nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if Section 301 is not understood to pre-empt such claims." *Id.* The Court elaborated:

> Claims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. *A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness . . ., as well as eviscerate a central tenet of federal labor-contract law* under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. at 219-20 (emphasis added). Clearly, therefore, "the requirement of § 301 as understood in *Lucas Flour* cannot vary with the name appended to a particular cause of action." *Id.* at 1916.

If the deciding issue becomes, as it was in the Ninth Circuit's decision below, whether a plaintiff had a "pre-existing" contract, 786 F.2d at 936 n.6, the practice of "artful pleading" will rise to unsurpassed heights. Under the Ninth Circuit's rule, plaintiffs would be able to plead that an individual contract was formed when, for example, a personnel director requests a job applicant to come in for an interview, or even when the supervisor explains the duties of the job before the "employee" is actually hired. Certainly, such state claims must be examined at least with "reference to," *Bale*, 795 F.2d at 780, a collective bargaining agreement. At minimum, federal law must be consulted to determine whether the so-called individual contract is "inconsistent with a collective agreement." *J.I. Case* at 339.

Finally, "[t]he grievance and arbitration process generally provides a quicker and less expensive means of redress and avoids further expansion of the already excessive caseload in our state and federal courts." Williams and Bagby at 44. This "explosive" expansion of "essentially federal" claims in the state courts is a matter of significant concern to employers, *id.* at 2, and an affirmance of the Ninth Circuit's rule would only serve to exacerbate the problem.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the Court of Appeals' decision be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
GAREN E. DODGE
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

January 16, 1987

AMICUS CURIAE

BRIEF

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In The

Supreme Court of the United States

October Term, 1986

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A.E. MATHESEN, KEITH WHEELER,

Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARRUTH and JOEL BRYAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF UNION PACIFIC RAILROAD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

I. MICHAEL GREENBERGER
(Counsel of Record)
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

MARK B. GOODWIN
Assistant General Solicitor
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5432

Counsel for *Amicus Curiae*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-526

CATERPILLAR INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A.E. MATHISEN, KEITH WHEELER,
Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE and JOEL BRYAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF UNION PACIFIC RAILROAD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Union Pacific Railroad Company ("Union Pacific") is a common carrier engaged in the provision of rail service in twenty-one states throughout the western and central regions of the United States. As such, the Union Pacific's labor relations are governed by the Railway

Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982) ("RLA").[1] While the instant case specifically concerns federal removal jurisdiction on the basis of Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1982), the same principles of federal removal jurisdiction are applicable to cases involving the RLA, and the Court's resolution of the issues presented can be expected to affect the availability of removal under the RLA as well. The issues presented in this case are closely related to those raised by the Missouri Pacific Railroad Company, a Union Pacific affiliate, in a petition for certiorari presently before this Court, *Missouri Pacific R. Co.* v. *Evans*, No. 86-765 (petition filed Nov. 12, 1986).

This case, like *Evans*, presents important questions concerning the existence of federal removal jurisdiction on the basis of preemption of state law causes of action by federal labor-contract law. The decision under review here announces a novel test which narrowly limits the availability of removal of ostensible state law claims, even those arising in fields subject to comprehensive federal regulation. The lower court decision in *Evans* is even more grudging, holding that federal preemption can *never* support removal jurisdiction. See *Evans* v. *Missouri Pacific R. Co.*, 795 F.2d 57 (8th Cir. 1986). The impact of these lower court rulings is to encourage employees wishing to circumven[t] grievance and arbitration procedures, made compulsory by contract in the LMRA context and by statute under the RLA, by pursuing common law causes of action in state courts. Decisions such as these threaten to undermine the congressional policy embodied in the federal labor laws favoring arbi-

[1] The Railway Labor Act governs labor relations in the railroad and airline industries, see 45 U.S.C. §§ 151, 181-88 (1982). Employers and employees subject to the Railway Labor Act are exempt from the coverage of the National Labor Relations Act. See 29 U.S.C. § 152(2)-(3) (1982).

tration as the means of settling labor disputes. This system of private settlement of workplace disputes through grievance and arbitration procedures is critical to peaceful labor-management relations. The Union Pacific has a vital interest in ensuring that appropriate dispute resolution procedures are not circumvented by a proliferation of employee lawsuits cast as claims under state law. Accordingly, the Union Pacific files this brief as *amicus curiae* in support of the petitioner herein.[2]

SUMMARY OF ARGUMENT

In *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court recognized the existence of federal removal jurisdiction over claims that, although cast as state law causes of action, fell within the preemptive scope of federal labor-contract law. In the decision below, the Court of Appeals adopted a novel test at odds with these precedents, under which removal jurisdiction over ostensible state law claims requires not merely complete federal preemption based upon comprehensive federal regulation of the field, but also a showing of the plaintiff's right to relief under applicable federal law. The latter requirement is not found in this Court's prior decisions and constitutes an unwarranted restriction of defendants' right to a federal forum. The Ninth Circuit's approach confuses the threshold question of federal jurisdiction with the ultimate question of the merits of putative federal claims. Most importantly, the approach adopted in the decision below requires courts to prejudge the merits of a plaintiff's claims under his collective bargaining agreement, in derogation of the strong federal policy of deference to arbitrators' interpretations of labor contracts. This

[2] All parties have consented to the filing of this *amicus curiae* brief.

Court should reaffirm that removal is available whenever purported state law claims fall within the scope of a comprehensive body of federal law, such as that comprised by our Nation's labor laws, which occupies the field to the exclusion of variant state laws.

ARGUMENT

I. The Preemption Removal Doctrine and the Decision Below

A. In *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court held that an action brought in state court, although ostensibly grounded in state law, may in some circumstances be removed to federal court on the basis of federal preemption. Under the doctrine of "preemption removal" [3] recognized in these decisions, a purported state law action "arises under" federal law, and thus falls within the original and removal jurisdiction of the federal district courts, whenever a comprehensive scheme of federal regulation "completely pre-empts," *Franchise Tax Board*, 463 U.S. at 24, or "displaces entirely," *id.* at 23, state law causes of action in the field. Because the exclusive source of law in such cases is federal, the plaintiff's complaint, even when cast in state law terms, necessarily invokes federal law. See *id.* at 22-27; *Avco*, 390 U.S. at 559-60; see also *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981).

Preemption removal has been widely recognized as appropriate in cases that, like this one, involve labor agreements subject to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). See, *e.g.*, *Avco*, *supra*; *Hillard* v. *Dobelman*, 774 F.2d 886 (8th

[3] Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 646-47 (1984).

Cir. 1985); *Mitchell* v. *Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985); *Olguin* v. *Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); *Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984). Section 301 represents a congressional directive to the courts to fashion a uniform body of federal law governing the interpretation and enforcement of labor agreements. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957). Variant doctrines of state law can have no application in this field, because interpretive uniformity is necessary to the stable, predictable system of collective bargaining through which our labor laws strive to achieve industrial peace. See *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). Section 301 entirely supplants all state law claims, whether purporting to sound in contract or tort, whose "resolution * * * is substantially dependent upon analysis of the terms of [a labor] agreement." *Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. 1904, 1916 (1985). Because Section 301 supplies the exclusive body of law in such cases, "any complaint that comes within [its] scope * * * necessarily 'arises under' federal law" and is removable by the defendant. *Franchise Tax Board*, 463 U.S. at 24.

The doctrine of preemption removal has also consistently been applied in the analogous context of labor disputes arising under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982) ("RLA"). The RLA creates a comprehensive system of federal arbitration for disputes concerning the interpretation and application of labor agreements and other grievances involving the employment relationship in the railroad and airline industries—so-called "minor disputes"—and thus leaves no room in which state law may operate. See, *e.g.*, *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972); *IAM* v. *Central Airlines*, 372 U.S. 682, 691-92 (1963). Ac-

cordingly, a state court suit based upon a minor dispute is removable to federal court, notwithstanding the plaintiff's failure expressly to invoke the RLA and irrespective of the tort- or contract-like nature of the plaintiff's purported state law claims. See, *e.g.*, *Graf* v. *Elgin, Joliet & Eastern Ry. Co.*, 790 F.2d 1341 (7th Cir. 1986); *Schroeder* v. *Trans World Airlines, Inc.*, 702 F.2d 189 (9th Cir. 1983); *McKinney* v. *International Ass'n of Machinists & Aerospace Workers*, 624 F.2d 745 (6th Cir. 1980). But see *Evans* v. *Missouri Pacific R. Co.*, 795 F.2d 57 (8th Cir. 1986), *petition for cert. filed*, No. 86-765.

B. Although purporting to recognize these settled principles, the Court of Appeals in this case imposed a new requirement for application of the preemption removal doctrine. The Court of Appeals held that, in order to achieve the "complete preemption" necessary to support removal of an ostensible state law action, federal law not only must occupy the field to the exclusion of state law, but also must "remedy the wrong [the plaintiff] asserts he suffered." *Williams* v. *Caterpillar Tractor Co.*, 786 F.2d 928, 933 (9th Cir. 1986) (citation omitted).[4] The Court of Appeals therefore examined the parties' collective bargaining agreement, and concluded that it did not afford the plaintiffs relief for "the grievance they complain of." *Id.* at 935. Accordingly, the Court of Appeals held that in this instance Section 301 did not supply a superceding federal remedy, and thus did not preempt state law with sufficient completeness to support removal. See *id.* at 935-37.

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[4] The Court of Appeals acknowledged that a "persuasive" argument could be made that federal occupation of the field is sufficient to support removal jurisdiction, but stated that binding Ninth Circuit precedent required the additional element of a superceding federal remedy available to the plaintiff. See *Williams*, 786 F.2d at 932 n.2.

II. The Court of Appeals' Approach to Preemption Removal Confuses the Question of Federal Jurisdiction with the Merits and Undermines the Federal Policy Favoring Arbitration of Labor Disputes

Under the novel approach to preemption removal announced by the Court of Appeals in this case, the existence of removal jurisdiction depends not merely upon whether a comprehensive body of federal law "completely pre-empts" state law causes of action, *Franchise Tax Board*, 463 U.S. at 24, but also upon whether federal law affords the plaintiff relief in the particular case. The Court of Appeals thus grafted an additional requirement upon the test reflected in this Court's *Avco* and *Franchise Tax Board* decisions, a requirement which effectively conditions a defendant's right to a federal forum upon his willingness to concede that the plaintiff has a valid federal claim on the merits. The Ninth Circuit's approach is unsound because, as one commentator has noted, it "confuses the question of whether a plaintiff is entitled to recover under federal law with the question of whether the only body of law upon which the plaintiff could base his cause of action is federal." Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. Chi. L. Rev. 634, 663 (1984). More fundamentally, the Court of Appeals' approach is untenable because it requires courts themselves to interpret labor contracts at the removal stage, in derogation of the strong federal policy of deference to arbitrators' interpretations of collective bargaining agreements.

A. This Court has repeatedly held that the threshold question of federal jurisdiction differs from the ultimate question of the merits of putative federal claims. See, *e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528, 542 (1974); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970); *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946). It is not necessary to demonstrate

that relief is available under federal law in order to establish federal question jurisdiction. See *Bell* v. *Hood*, 327 U.S. at 682 ("[j]urisdiction * * * is not defeated * * * by the possibility that the averments might fail to state a cause of action on which [plaintiff] could actually recover."). Rather, it is enough to show that a claim for relief under federal law is not "wholly insubstantial and frivolous." *Id.* at 682-83.

The Court has specifically recognized the force of this principle in the context of actions arising under Section 301 of the LMRA. In *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), for example, the Court held that a suit seeking damages against union officials for breach of a collective bargaining agreement necessarily arose under Section 301 rather than state law, but went on to hold that under Section 301 a claim was not stated on the merits. See *id.* at 245-49; *id.* at 247 n.6 ("Our holding * * * is that the suit is a § 301 suit; whether there is a claim upon which relief can be granted is a separate question. See *Bell* v. *Hood*, 327 U.S. 678."). Similarly, in recognizing the doctrine of preemption removal in *Avco*, the Court emphasized that the existence of federal jurisdiction *vel non* is not determined by reference to the scope of relief available to the plaintiff. At that time, the federal courts were regarded as without power to issue injunctions enforcing no-strike promises contained in labor agreements.[5] Nevertheless, the Court held that the injunctive action before it was properly removed to district court, observing that "[t]he nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Avco*, 390 U.S. at 561. Rather than examine whether the plaintiff was entitled to relief under federal law, as the decision below would

[5] See *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), *overruled, Boys Market, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

have it, the Court in *Avco* simply looked to whether the plaintiff's claim was within the field preempted by Section 301. See *id.* at 560.[6] The Ninth Circuit's opinion failed to reconcile its novel approach toward preemption removal with the principle that federal jurisdiction differs from the merits, and, in fact, did not even advert to this Court's decisions expounding that principle.

B. In addition to contravening basic principles of federal jurisdiction, the Ninth Circuit's approach raises unique problems when applied in the field of federal labor law. Whether an employee's contractual grievance states a claim on the merits under federal law depends upon the terms of his collective bargaining agreement and industry and plant custom and practice. Thus, application of the Ninth Circuit's approach in labor cases requires a court itself to engage in interpretation of labor agreements at the removal stage, in derogation of "the central role of arbitration in our 'system of industrial self-government.'" *Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. 1904, 1915 (1985) (citation omitted).

This Court's decisions have consistently emphasized the need to avoid judicial encroachment on the province of labor arbitrators. See *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); see also *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (arbitration under the RLA). Judicial deference is appropriate because it is the arbitrator's interpretation that the parties have bargained for, see *Enterprise Wheel*, 363 U.S. at 599, and because arbitrators have

[6] This Court has recognized time and again that the scope of federal labor preemption is not diminished (but rather is, if anything, increased) by the fact that state law provides remedies unavailable under federal law. See, *e.g.*, *Wisconsin Department of Industry* v. *Gould*, 106 S. Ct. 1057, 1061 (1986); *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669, 684 (1983); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959).

unique expertise in interpreting collective bargaining agreements. See *AT & T Technologies, Inc.* v. *Communications Workers of America*, 106 S. Ct. 1415, 1419 (1986). The arbitrator's method of analysis is "foreign to the competence of courts," *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960):

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82.

In recognition of arbitrators' superior expertise in interpreting labor agreements, this Court has cautioned that courts should not substitute their judgment for that of arbitrators. See *Enterprise Wheel*, 363 U.S. at 598-99. Initial judicial examination of the terms of labor agreements is strictly limited to the question of whether the parties have agreed to arbitrate the dispute in question, see *AT & T Technologies*, 106 S.Ct. at 1419, and ultimate judicial review of arbitration awards is limited to determining whether the arbitrator's award "draws its essence" from the contract. *Enterprise Wheel*, 363 U.S. at 597. Moreover, courts may not award a party interim relief based upon "a judicial preview of the facts and the law" underlying a grievance subject to arbitration, because prejudging the merits in this manner inevitably impinges on the arbitrator's independence. *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397, 411 (1976).[7]

[7] The broad scope of preemption of state law causes of action that this Court has afforded Section 301, furthermore, is buttressed by concern that circumvention of the arbitration process through pursuit of state court lawsuits will undermine its effectiveness in securing peaceful labor-management relations. See *Allis-Chalmers Corp.* v. *Lueck*, 105 S. Ct. at 1915-16; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965). The same reasoning applies with even greater force in the Railway Labor Act context because arbitration of grievances under the RLA is a compulsory statutory obligation rather than merely a function of the parties' agreement. See *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972).

Because lawsuits arising under federal labor-contract law cannot be maintained until arbitral remedies are exhausted, moreover, such suits are generally dismissed upon removal from state court. Thus, recognizing federal jurisdiction in such circumstances will not burden the federal judiciary's docket, but rather will shift the locus of disputes from state courts to arbitrators.

The approach toward preemption removal announced by the Ninth Circuit in this case conflicts with the consistent theme of this Court's decisions. The Court of Appeals' approach requires a district court to construe the provisions of a labor agreement at the removal stage and to determine, not merely whether an arbitrable grievance exists, but whether a claim is stated on the merits. This approach threatens to undermine federal labor policy in at least two respects. First, a primary judicial role in the interpretation of labor agreements raises the possibility that courts, unsteeped in the contextual subtleties of labor-management relations, will systematically misread the parties' bargain. Second, as this Court noted in *Buffalo Forge*, a "judicial preview" of the merits of a grievance is likely to influence and constrain the course of any subsequent arbitration proceedings.[8] The approach adopted by the court below simply cannot be squared with the fundamental principle that "it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lueck*, 105 S. Ct. at 1916.

[8] For instance, where a district court determined that the plaintiff was entitled to relief under the governing labor agreement, and thus (under the Court of Appeals' approach) that the plaintiff's action could properly be characterized as arising under Section 301, the proper course would be for the court to dismiss the plaintiff's claim for failure to pursue grievance and arbitration remedies. See *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). An arbitrator in those circumstances would be hesitant to disagree with the court's conclusion that the plaintiff's grievance stated a claim under the contract. See *Buffalo Forge*, 428 U.S. at 412.

The potential harms that flow from judicial encroachment upon the province of arbitrators were fully realized in this case. In applying its test for removal jurisdiction, the court below held that the plaintiffs had no claim under their collective bargaining agreement because "no provision of the agreement" supported a claim of the sort articulated in their state court complaint. *Williams* v. *Caterpillar Tractor Co.*, 786 F.2d 928, 936 (9th Cir. 1986). Arbitrators, however, do not interpret a labor agreement solely by reference to the four corners of the document, but rather bring to bear their knowledge of industry and plant custom, past practice, and other aspects of the "industrial common law." *Warrior & Gulf*, 363 U.S. at 581-82. Fairly read, the plaintiffs' complaint alleged an informal company custom or policy, manifested in manuals distributed to all employees and in oral representations made both before and while the plaintiffs were bargaining unit employees, that employees would not be terminated in the event of plant closure. See Complaint ¶¶ 27-29 (App. to Petition for Cert. at 42-49). This is a classic "law of the shop" claim, grist for the mill of labor arbitrators. See, *e.g.*, *Baker Marine Corp.* v. *United Steelworkers of America, Local 8237*, 84 Lab. Arb. (BNA) 627 (1985) (Marlatt, Arb.) (holding that employer's letter to union regarding layoff policy formed part of parties' agreement); *Formosa Plastics Corp.* v. *General Truck Drivers, Local No. 5*, 79 Lab. Arb. (BNA) 1205 (1983) (Taylor, Arb.) (considering claim that past practice established employer's policy regarding severance pay for laid-off workers); *Union Oil Co.* v. *Miscellaneous Warehousemen, Local 986*, 81 Lab. Arb. (BNA) 540 (1984) (Richman, Arb.) (holding that arbitrable grievance was stated over whether employer's letter regarding contracting-out policy formed part of parties' agreement); *Hayssen Manufacturing Co.* v. *UAW, Local 1432*, 82 Lab. Arb. (BNA) 500 (1984) (Flaten, Arb.) (holding that representation in employee handbook regarding benefits formed part of parties' agreement); see also NRAB First Division Award No. 23334 (June 15, 1985) (under RLA, holding that past practices regarding employees' privacy rights formed part of parties' agreement). The plaintiffs' claims in this case, whatever their ultimate merit, involve a "dispute[] that require[s] for [its] solution knowledge of the custom and practices of a particular factory." *Enterprise Wheel*, 363 U.S. at 596.[9]

III. The Court of Appeals' Approach to Preemption Removal Is Especially Harmful in the Railway Labor Act Context

The Union Pacific and other carriers have in recent years been faced with an increasingly large volume of state court litigation based upon employee labor grievances cast as common law claims. While the instant case concerns preemption removal under Section 301 of the LMRA, this Court's resolution of the questions presented undoubtedly will affect the availability of removal under the Railway Labor Act as well. The question is of exceptional importance, as the RLA currently governs over 900,000 persons employed in the railroad and airline industries (see note 1 *supra*), and more than 180,000 grievances are presented annually to the major carriers in the railroad industry alone. See Petition for Writ of Cert. at 19, *Missouri Pacific R. Co.* v. *Evans*, No. 86-765 (petition filed Nov. 12, 1986). Accordingly, the Union Pacific urges the Court to bear in mind that the approach toward preemption removal adopted by the Court of Appeals in this case portends especially harmful consequences in the RLA context.

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[9] Although the district court essentially viewed the plaintiffs' claim in this way, see App. to Petition for Cert. at 27-28, the Court of Appeals disregarded the district court's reading of the complaint and blithely asserted that the plaintiffs could not even have stated an arbitrable grievance under the parties' collective bargaining agreement. *Williams* v. *Caterpillar Tractor Co.*, 786 F.2d at 936 n.4. The Court of Appeals' ruling on arbitrability appears to rest on its mistaken view of the merits—that is, that a valid claim under a labor agreement must be evident from the four corners of the document.

The congressional policy favoring arbitration as the means of settling labor disputes, of vital importance under the LMRA, is even stronger in the RLA context. Congress created in the RLA a "mandatory, exclusive, and comprehensive" system of arbitration of workplace grievances in the railroad and airline industries. *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963). Under the RLA, so-called "minor disputes"—disputes concerning the interpretation or application of labor agreements or otherwise "founded upon some incident of the employment relation," *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S. 711, 723 (1945)—must be submitted for resolution to federally constituted arbitration panels known as railroad adjustment boards. 45 U.S.C. §§ 151a(5), 153 First (1982). Thus, employees who attempt to circumvent arbitral resolution of workplace disputes in the railroad and airline industries by pursuing common law claims in state court disregard a statutory obligation, not merely a contractual undertaking as under the LMRA. See *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320, 323 (1972). As this Court has observed, "Congress considered it *essential* to keep * * * 'minor' disputes within the Adjustment Board[s] and out of the courts." *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added).

The considerations generally supporting judicial deference to labor arbitrators' interpretations of collective bargaining agreements are also especially weighty in the RLA context. The railroad industry has been likened to "'a state within a state,'" *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, 371 (1955) (citation omitted); its practices, customs, and usages often have no parallel in other fields. This Court has specifically taken judicial notice of the fact that labor agreements in the railroad industry "are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application." *Pennsylvania R. Co.* v. *Day*,

360 U.S. 548, 553 (1959). Moreover, because such agreements often expressly include only a small portion of the rules governing day-to-day working conditions on railroads, arbitrators frequently must resort to the unwritten "common law" of the shop or the industry. See *Detroit & Toledo Shore Line R. Co.* v. *United Transp. Union*, 396 U.S. 142, 154-55 (1969). In short, interpretation of railroad labor agreements is a task within the "peculiar[] competen[ce]" of the federal adjustment boards and, conversely, foreign to the competence of courts. *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946); see *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. at 94.

As shown above, application of the Ninth Circuit's approach toward preemption removal would require courts themselves to weigh the merits of railroad employees' contractual grievances at the removal stage. Where district courts determined that no relief was available under the RLA, removal would be denied, and the question of the preemptive effect of the RLA would be relegated to the state courts for decision.[10] The pattern of recent decisions, however, suggests that state courts are far less sympathetic to claims of RLA preemption than are federal courts.[11] Given this pattern, the practical effect

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[10] The same result would follow from application of the even more restrictive approach adopted in *Evans* v. *Missouri Pacific R. Co.*, 795 F.2d 57 (8th Cir. 1986), *petition for cert. filed*, No. 86-765. Contrary to this Court's *Franchise Tax Board* and *Avco* opinions and numerous Court of Appeals rulings, see cases cited at pp. 4-6 *supra*, the Eighth Circuit in *Evans* held that the preemptive effect of federal labor law can *never* support removal of state law causes of action.

[11] Compare, *e.g.*, *Stephens* v. *Norfolk & Western Ry. Co.*, 792 F.2d 576 (6th Cir. 1986) (finding RLA preemption of state law claims); *Landfried* v. *Terminal R. Ass'n*, 721 F.2d 254 (8th Cir. 1983) (same); *Jackson* v. *Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983) (same); *Choate* v. *Louisville & Nashville R. Co.*, 715 F.2d 369 (7th Cir. 1983) (same); *Beers* v. *Southern Pacific Transp. Co.*, 703 F.2d 425 (9th Cir. 1983) (same); *Magnuson* v.

of shifting the locus of preemption litigation from the federal to the state courts would be to invite widespread circumvention of the congressionally-mandated arbitration system. Because this result undermines the integrity and effectiveness of the RLA's dispute-resolution mechanisms, denying defendant carriers a federal forum in such cases threatens to disturb the delicate compromise upon which peaceful labor-management relations in the railroad and airline industries rest. See *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 613 (1959).

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

I. MICHAEL GREENBERGER
(Counsel of Record)
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

MARK B. GOODWIN
Assistant General Solicitor
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5432

Counsel for *Amicus Curiae*

Dated: January 16, 1987

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AMICUS CURIAE

BRIEF

No. 86-526

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CATERPILLAR, INC., *et al.*,
Petitioners,

v.

CECIL WILLIAMS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JAMES C. PARAS*
JAMES E. BODDY, JR.
KINGSLEY R. BROWNE
Morrison & Foerster
345 California Street
San Francisco, CA 94104
Telephone: (415) 434-7000
Attorneys for the Chamber of Commerce of the United States
*Counsel of Record

Of Counsel:
STEPHEN A. BOKAT
PAULA J. CONNELLY
National Chamber
Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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2 *Collective Bargaining Negotiations and Contracts* (1986)	28

No. 86-526

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CATERPILLAR, INC., *et al.*,
Petitioners,
v.
CECIL WILLIAMS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

With the consent of the parties,[1] the Chamber of Commerce of the United States ("Chamber") respectfully submits this brief *amicus curiae* in support of the petitioners. The Chamber, a non-profit membership organization, is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on labor relations matters before all branches of the federal government.

[1] The consent letters of both counsel have been filed with the Clerk of the Court.

Many of the Chamber's members are parties to collective bargaining agreements, and the decision of this Court potentially affects every employer who is a party to such an agreement. Accordingly, the Chamber is peculiarly able to present to the Court the views of the business community on the issues presented in this case and offers a potentially broader perspective than that provided by the parties before the Court.

SUMMARY OF ARGUMENT

A claim based upon state law is removable to federal court if, properly characterized, it is in fact a federal claim. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983). A breach of contract action brought against an employer by a bargaining unit member is just such a claim, because it may be brought only under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C § 185. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

Upon entry by the employee into the bargaining unit, individual agreements such as the ones asserted by the plaintiffs[2] lose their force as independent contracts. *See J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). A member of the bargaining unit lacks the power to order his own relationships with his employer. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). Thereafter, the employment of the new entrant is on the same terms as his colleagues in the unit. Whether the terms of the individual agreement are more advantageous than the terms of the collective bargaining agreement is immaterial, because "the collective agreement covers the whole employment relationship." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). Thus, any contract claim asserted by a member of a collective bargaining unit of necessity "arises under" § 301 and is therefore removable from state court.

To the extent that individual contracts have any continuing force at all, it is only as part of the background of surrounding

[2] For ease of reference, respondents in this Court, who were the plaintiffs below, will be referred to as "plaintiffs."

circumstances that informs the interpretation of the collective bargaining agreement. An alleged breach of the individual agreement, therefore, is analogous to conduct allegedly contrary to past practice, industry custom, or other such background circumstances properly consulted by arbitrators to flesh out the collective agreement. *See Warrior & Gulf*, 363 U.S. at 580-581. Such circumstances do not, however, provide an independent source of rights. The issue necessarily remains one of federal law: whether the employer has breached the collective bargaining agreement.

The Ninth Circuit's decision permitting represented employees to bring contract actions under state law would have significant detrimental effects on collective bargaining relationships and run counter to a number of federal policies. The federal policy of exclusive representation would be undermined, because the union would be the representative of employees only in the limited sphere of the express provisions of the collective bargaining agreement, with individual employees still free to establish differing contractual arrangements. The federal policy favoring arbitration of industrial disputes is likewise threatened, because disputes that heretofore would have been presented to an arbitrator will now be presented to a court, with the court necessarily immersing itself in the "law of the shop" to determine the meaning of the labor agreement. Finally, the federal policy favoring interpretive uniformity is threatened by the Ninth Circuit's ruling. That court ruled that a claim on a state-law contract could proceed, because it found that the collective bargaining agreement did not provide a remedy for the challenged conduct. Yet the meaning of silence in a labor agreement is properly a question of federal law. Permitting state law to insinuate itself into the gaps that exist in every collective bargaining agreement means that the significance of those gaps will differ from state to state. The national labor policy cannot countenance such a result.

ARGUMENT

I

STATE-LAW CLAIMS FOR BREACH OF CONTRACT ARE "COMPLETELY PREEMPTED" BY SECTION 301 OF THE LMRA, MAKING REMOVAL APPROPRIATE UNDER *FRANCHISE TAX BOARD.*

At the outset, it is important to identify certain key principles of the law governing removal of actions to federal court that are not in dispute. Caterpillar, plaintiffs, and the court below all seem to agree that the "artful pleading" exception to the "well-pleaded complaint" rule governs the outcome of this case. Under that exception, an action may be removed to federal court even if the plaintiff pleads a claim for relief under state contract law and even if he has sought a remedy available only under state law, "if a federal cause of action completely preempts a state cause of action." *See Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 23, 24 (1983). If "complete preemption" exists, "any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law," within the meaning of 28 U.S.C. § 1331. *Id.* at 24. A court may look beyond the complaint, so "that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Id.* at 22.

Where the parties differ is over the question whether § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "completely preempts" the state contract cause of action at issue in this case, thus providing a basis for federal jurisdiction. That question necessarily turns on the substantive scope of § 301, which this Court has noted has a "powerful" preemptive force to "displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Board*, 463 U.S. at 23.

In *Franchise Tax Board, supra*, the Court established two methods of demonstrating "complete preemption." Federal jurisdiction exists in those cases "in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." 463 U.S. at 27-28.

Naturally, the mere fact that a particular claim *could* be brought under federal law does not necessarily mean that it *must* be brought under federal law. In many forms of action, a plaintiff may simply elect not to pursue federal remedies and may instead pursue parallel state remedies. *See The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("the party who brings a suit is master to decide what law he will rely upon . . . "). In other areas, however, the federal scheme entirely displaces the state scheme, so that any action must necessarily be brought under federal law. It is by now beyond dispute that § 301 is such a law. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Therefore, if plaintiffs' claims could have been brought under § 301, they must be treated as having been brought under § 301, and the action was properly removed to federal court. *Franchise Tax Board*, 463 U.S. at 23; *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968).

Plaintiffs' action was similarly removable if it raised in a state-law action a need for "the kind of adjudication for which jurisdiction would serve congressional purposes." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229, 3235 (1986). As discussed in later sections of this brief, a number of principles basic to the national labor policy established by Congress are implicated by state-law contract actions brought by employees covered by collective bargaining agreements. Analysis of plaintiffs' claims will require interpretation of the collective bargaining agreement, since it must be determined, at the very least, whether the terms of the implied contract upon which he seeks relief are inconsistent with the terms of the collective bargaining agreement. However, this Court just two terms ago reaffirmed that

> when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, see *Avco Corp. v. Aero*

Lodge 735, 390 U.S. 557 (1968), or dismissed as preempted by federal labor-contract law.[3]

Allis-Chalmers Corp. v. Lueck, 471 U.S. at 220.

The case before the Court satisfies both of the *Franchise Tax Board* standards. It satisfies the first because any individual contract to which Caterpillar and plaintiffs were parties became—to the extent it survived at all—a part of the collective bargaining agreement. It satisfies the second because resolution of plaintiffs' claims will require interpretation of not only the collective bargaining agreement, but the entire relationship between Caterpillar and the union as well.[4]

A. Individual Agreements, To The Extent They Are Permissible Under *J.I. Case*, Become Part Of The Collective Bargaining Agreement.

Plaintiffs contend that their action falls outside the scope of § 301 jurisdiction because it is based upon individual contracts entered into prior to their assuming positions within the bargaining unit. However, the collective message of numerous cases decided by this Court is that such contracts retain validity, if at all, only as a part of the collective bargaining agreement.

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[3] Although *Lueck* establishes the possibility of two separate consequences of raising a state-law claim dependent upon the analysis of the terms of a collective bargaining agreement—treating it as a § 301 action or dismissing it as preempted—the appropriate disposition of a state contract action, as discussed below, is to treat it as a § 301 action due to the merger of the contract into the collective-bargaining agreement. The employee would then be required to demonstrate exhaustion of the agreement's grievance-arbitration mechanism. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). If he could not, then the proper course would be dismissal of his action, which is precisely what occurred in the district court below.

[4] Because plaintiffs' action was removable if any one of the claims arose under federal law, it is not necessary to address the independent removability of plaintiffs' tort claims of fraud and intentional infliction of emotional distress. However, it should be noted that each of those causes of action is predicated on the assertion that Caterpillar breached their individual contracts of employment.

This Court has had few occasions to address directly the question of the relationship between individual contracts and collective bargaining agreements. However, in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court established the primacy of the collective bargaining agreement.[5] The employer in that case attempted to interpose preexisting individual contracts with employees as a bar to representation proceedings and to a union bargaining demand. The employer offered to negotiate on matters not affecting rights under the individual contracts and indicated that it would bargain as to all matters after expiration of the individual contracts. The Court rejected the employer's defense based upon the existence of individual contracts, stating that "[t]he individual hiring contract is subsidiary to the terms" of the collective bargaining agreement. *Id.* at 336. Although the Court acknowledged that it was "not called upon to state that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement," it noted that "[t]he practice and philosophy of collective bargaining looks with suspicion on such individual advantages." *Id.* at 338-339.

Thus, *J.I. Case* establishes a prohibition against individual contracts containing terms less favorable to the employee. Its observation that individual advantages are to be looked upon with suspicion should be viewed as establishing, at the very least, a presumption against individual contracts with more favorable terms. Two questions remain, however. First, are there *any* circumstances under which individual contracts have validity as independent contracts, and, if so, what law governs their interpretation? Second, if they have no validity as independent contracts, precisely what, if any, is their effect?

1. Individual Contracts Between Employers and Employees Have No Independent Validity.

The answer to the first question must be in the negative: individual contracts between employers and employees concern-

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[5] The decision in *J.I. Case* has been characterized as "a cornerstone of American labor law and collective bargaining." Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 Buff. L. Rev. 210 (1966).

ing the terms and conditions of employment should be deemed extinguished by the collective bargaining agreement. With respect to such subjects, the union is the exclusive representative of all employees in the bargaining unit. *See, e.g., NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967):

> National labor policy . . . extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees. . . .

The system of collective bargaining "of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *see also American Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950) ("Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them"). Despite plaintiffs' contention that they should enjoy the individual advantages to which they allegedly became entitled before joining the bargaining unit, this Court has made clear that "individual advantages or favors will generally in practice go in as a contribution to the collective result." *J.I. Case*, 321 U.S. at 339. This is a necessary consequence of the collectivization of the employment relationship, since to exclude the most valuable members of the bargaining unit from the operation of the labor agreement would almost certainly mean that the terms of the agreement applicable to the remaining members would be less favorable than they otherwise would be. Allowing individual advantages also would lead inevitably to competition among union members, a result not conducive to the federal goal of industrial peace.

Contrary to the view of the Ninth Circuit, a collective bargaining agreement governs the rights and obligations of *all* members of the bargaining unit regardless of their prior employment history. That court found it significant that the alleged independent contract in this case was "entered into outside of the collective bargaining unit," distinguishing other cases involving employees who had belonged to the bargaining unit at the inception of the alleged contract. *See Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984).

The attempted distinction between contracts formed prior to entry into the bargaining unit and those formed thereafter is unpersuasive. Despite characterization by the Ninth Circuit of plaintiffs' contracts as "preexisting," these contracts, to the extent they existed at all, were not only preexisting, they were coexisting. The Ninth Circuit's view is that throughout plaintiffs' employment in the bargaining unit Caterpillar was governed in its relations with them not only by by the collective bargaining agreement, but also by an implied agreement under state law. Thus, for plaintiffs' entire tenure in the bargaining unit, these two parallel contractual relations coexisted, with all of the conflict and uncertainty that such parallel obligations would entail. Moreover, the Ninth Circuit's analysis is devoid of any principle that would distinguish a case in which the contract arose years prior to entry into the bargaining unit, as here, and one in which it arose during a job interview one hour before entry into the unit—or even where it arose after entry into the unit.

The timing analysis also ignores the consequences to an employee when he assumes a job within the bargaining unit. When an employee moves into the bargaining unit, he enters the unit on an equal status with his colleagues. The terms and conditions of his employment are established by the collective bargaining agreement, and there is neither authority nor logic to support the view that when an employee enters the bargaining unit from a non-bargaining-unit position the terms and conditions of his employment more favorable than the labor agreement survive, while the terms less favorable are extinguished. Yet that is the necessary consequence of the Ninth Circuit's ruling.

The mere fact that the collective bargaining agreement was negotiated prior to the employee's entry into the unit is no more relevant than the fact that a collective bargaining agreement was adopted despite an individual employee's opposition to union representation and despite his opposition to the content of the agreement. That is, coverage by the collective bargaining agreement is not a question of individual assent to the terms of the agreement. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at

180 ("The employee may disagree with many of the union decisions but is bound by them."); *J.I. Case*, 321 U.S. at 339 ("The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules. . . . "). The collective bargaining agreement is not a smorgasbord of terms of employment from which an employee may pick and choose at will nor is it a Chinese menu from which some employees—those who at all relevant times have been members of the bargaining unit— select from Column A, while others—such as plaintiffs—select from Columns A *and* B. Instead, it is part and parcel of the employment relationship for all bargaining-unit employees regardless of their prior employment history.

The Court has recognized that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . . " *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944). The fact that an employee entered the bargaining unit after negotiation of the collective bargaining agreement does not diminish the application of that agreement to the employee any more than the application of a state statute is diminished as to a person who moves into a state after enactment of the statute by the legislature. In either event, the salient fact is that once in the "jurisdiction," the rules apply equally to all.

Although *J.I. Case* left open the question of the legitimacy of individual contracts advantageous to the employee, the Court's subsequent cases establish compelling reasons for refusing to recognize them as separate contracts unrelated to the collective bargaining agreement. The foundation of our national labor policy is that the most effective means for employees to better their lot is "by pooling their economic strength and acting through a labor organization freely chosen by the majority." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. at 180. Individual advantages run counter to this policy and "may prove as disruptive of industrial peace as disadvantages," because they are "often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creat[e] the suspicion of being

paid at the long-range expense of the group as a whole." *J.I. Case*, 321 U.S. at 338-339.

This very case demonstrates the invidiousness of individual advantages. Plaintiffs claim that they were entitled under their private agreement to employment "as long as their job performance remained satisfactory" and "that if the San Leandro facility ever closed, Caterpillar would provide employment opportunities for them. . . ." App. to Pet. for Cert. at A-48. They were assured, they claim, that they "could count on the corporation to take care of them." App. to Pet. for Cert. at A-43. They were party to "a total employment agreement wholly independent of the collective bargaining agreement pertaining to hourly employees." App. to Pet. for Cert. at A-49. These rights were superior to those enjoyed by their fellow bargaining-unit members, who lacked the benefits of this "total employment agreement."[6] It is difficult to believe that such promises by an employer, if permitted, would not be paid for by the other employees in the bargaining unit. That is, to the extent that an employer allocates resources to "take care of" specific employees, it has that many fewer resources to "take care of" the other members of the bargaining unit.[7]

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[6] Plaintiffs probably do not dispute that the union could bargain away any individual contract rights that existed. Instead, the argument is simply that it did not do so. However, even if it were alleged that the union had bargained away those rights, the Ninth Circuit apparently would not have held a contract action to be removable, because the argument that plaintiffs' rights had been bargained away would probably also be labelled "defensive."

[7] Plaintiffs' contentions also raise the spectre of discrimination, since some of them formerly held positions in management. It is during this period that they claim they became cloaked with the protection of the implied contract that was created in large part by various "memoranda, manuals, brochures and handbooks" applicable to all nonbargaining unit employees. App. to Pet. for Cert. at A-43. Thus, the consequence of their argument is that employees in California who have spent time in management positions, or at least in nonbargaining unit positions, have rights superior to those whose entire employment has been spent in the bargaining unit.

The Ninth Circuit's analysis raises another question: Why can't an employee allege a promise that is coextensive with the collective bargaining agreement and elect to sue on state-law grounds? For example, suppose an employee is promised while he is outside the bargaining unit that he will never be laid off, whether from a nonbargaining-unit job or from a bargaining-unit job, as long as there is a person in the company with less seniority. Suppose he then moves into a bargaining-unit position and is covered by a collective bargaining agreement that similarly provides for a seniority-based layoff system. Suppose further that he is then laid off out of turn in violation of both the collective bargaining agreement and the individual contract. If, as the Ninth Circuit and plaintiffs appear to believe, the preemption analysis looks to whether the promise was made outside the bargaining relationship and whether it is inconsistent with the collective bargaining agreement, then the employee should have the right to elect whether to pursue a grievance under the collective bargaining agreement or a state contract cause of action. Inconsistency of result, as well as uncertainty concerning the nature of the parties' obligations, would inevitably result.[8]

Interestingly, the policies relied upon by plaintiffs are not limited to nonbargaining unit employees, which creates a problem for their argument. If the policies are limited to nonbargaining unit employees, then they were not applicable to plaintiffs, since plaintiffs were in the bargaining unit at the time of the alleged breach. If the policies also extend to bargaining unit employees, however, then it is indisputable that they would become a part of "the common law of the shop," as discussed by this Court in *Warrior & Gulf, supra.*

[8] It is no answer to rely upon *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its progeny to argue that parallel arbitration and judicial remedies pose no threat to bargaining relationships. *See also McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). The rights at issue in those cases existed irrespective of the terms of the collective bargaining agreement and required no interpretation of it. Moreover, they were created not by the parties but by the government to further a well-defined public interest. The rights "created" by the implied contract, on the other hand, are merely private rights, necessarily involving interpretation of the collective bargaining agreement.

The Ninth Circuit held that plaintiffs' cause of action was not based upon § 301 for two reasons: first, it "involves the violation of entirely separate and independent contracts made outside of the collective bargaining process," App. to Pet. for Cert. at A-14; and second, "resolution of the employees' state law cause of action is not focused upon interpretation of the collective bargaining agreement." App. to Pet. for Cert. at A-15. The same is true in the hypothetical presented above. The only distinction is that the Court of Appeals believed that plaintiffs' action could not have been brought as a § 301 action, while it would certainly agree that the hypothetical action described above could have been so brought. However, it is not apparent why that should make a difference in resolving the question whether the individual contract can provide an independent source of rights. As long as the state contract claim is not inconsistent with the collective bargaining agreement, the Ninth Circuit's logic should allow this election.[9]

The answer is that the hypothetical individual should not be permitted to proceed on a state-law claim for just the same reasons that plaintiffs should not be permitted to so proceed. Regardless of the agreement made while the employee was outside the bargaining unit, once the employee enters the unit, the collective bargaining agreement defines "the whole employment relationship." *Warrior & Gulf*, 363 U.S. at 579. *See also Allis-Chalmers Co. v. Lueck*, 471 U.S. at 213 ("state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements"). Moreover, the mere fact that a collective bargaining agreement is silent on a particular issue does not mean that it becomes an area for individual negotiation. The silence of the agreement may reflect many things: it may mean that the parties were unable to agree on the issue, that the issue is left to management discretion under a

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[9] Significantly, even a broad "zipper" clause stating that the collective bargaining agreement is the complete agreement of the parties on all subjects would probably not insulate the employer from individual claims under the Ninth Circuit's view, since the individual contracts, by definition, are not between the company and the union.

management-rights clause, *see NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), or simply that it did not occur to the parties to cover the particular issue.

The entire issue of inconsistency is really a non-issue, because except in those situations where the provisions of the collective bargaining agreement and the individual contract are wholly congruent, any individual contract is, in a very real sense, inconsistent with the collective agreement. That is, any given action by an employer is either permissible or impermissible under the collective bargaining agreement. If it is impermissible, then the action may be challenged under the agreement's grievance procedure. If the individual contract purports to grant the same remedies for the same wrong as does the collective bargaining agreement, it is merely redundant. However, if the individual contract purports to grant greater or lesser remedies for the same wrong, it is *pro tanto* inconsistent.

On the other hand, if the employer's action is permissible under the agreement, then any individual contract purporting to make the action impermissible is inconsistent with the collective agreement. For example, under the circumstances of this case, if Caterpillar was within its rights under the collective bargaining agreement in laying plaintiffs off, then any individual contract purporting to limit those rights is inconsistent and therefore of no effect. This Court recognized as much in *Warrior & Gulf*, 363 U.S. at 583, where it stated:

> Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and *absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular unilaterally imposed conditions.* (emphasis added).

In sum, the Ninth Circuit's conclusion that individual contracts could properly exist between Caterpillar and plaintiffs is erroneous. Whether the asserted contracts are more advantageous or less advantageous than the provisions of the collective bargaining

agreement, it is the collective bargaining agreement, and that agreement *alone*, that governs the rights and obligations of the employer and its union employees.

2. To The Extent That Individual Contracts Have Any Force, It Is To Inform The Arbitrator's Interpretation Of The Collective Bargaining Agreement.

Once it is established that individual contracts have no continued existence *as contracts*, the question remains whether they have any continued force at all. That question can be resolved correctly only through an understanding of the nature of the collective bargaining relationship.

The collective bargaining agreement is more than a mere contract; instead, it is "a generalized code to govern a myriad of cases." *Warrior & Gulf*, 363 U.S. at 578. It does not govern simply those matters addressed within the four corners of the agreement itself; rather, it "covers the whole employment relationship." *Id.* at 579. It is a comprehensive constitution governing employer-employee relations, rather than simply one of a number of co-equal contractual arrangements that may govern the employment of a member of the bargaining unit.

As this Court has recognized, the need to reach an agreement covering a multitude of issues—as well as the need for an instrument reflecting the agreement that is not unduly cumbersome—results in "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." *Id.* at 580 (quoting Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1004-1005 (1955)). This "expression of hope and good faith" in the future resolution of issues is a faith not so much in the other party to the labor agreement, but faith in the "proctor" of their bargain—the arbitrator. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

One of the arbitrator's primary functions is to fill in the gaps that may exist in the contract by forging a "common law of the

shop." *Id.* at 579, 580. Professor Cox has described the "law of the shop" as follows:

> Of course this body of shop law is not made up exclusively or even largely of arbitration decisions. 'The parties to a collective agreement start in a going enterprise with a store of amorphous methods, attitudes, fears and problems.' The agreement 'is based upon a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ.' The assumptions and practices which have prevailed in the past and as they develop in the future are not only the background of the agreement but the flesh and blood which gives it meaning.

Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 24 (1957) (citations omitted).

These "assumptions and practices" that become a part of the common law of the shop may include, in the proper case, the kinds of agreements that plaintiffs attempt to rely on. This Court has recognized that intentional or inadvertent gaps in the written document "may be left to be filled in by reference to the practices of the particular industry or of the various shops covered by the agreement." *Warrior & Gulf* at 1351. Like any other evidence bearing on policies, customs, or past practices, the individual agreement alleged by plaintiffs may be placed before the arbitrator for purposes of determining the meaning of the collective bargaining agreement. However, regardless of whether the terms of the individual contracts are consistent with the terms of the collective bargaining agreement, any claim for breach of that contract must be treated as a claim for breach of the collective bargaining agreement.[10]

In holding that an individual contract could be relied upon as an independent parallel source of contractual rights, the Ninth Circuit was led into error by its constricted view of the nature of

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[10] Arbitrators in fact tend to treat them as such. *See, e.g., Dempster Bros., Inc.*, 61-1 Arb. ¶ 8194 at 3668, 3670 (Cantor 1968) ("A specific agreement made with the employee would properly be a part of his employment under the general collective bargaining agreement and would be enforceable by grievance procedures.").

the collective bargaining agreement. Because it viewed the implied contracts relied upon by plaintiffs as "entirely separate and independent contracts made outside of the collective bargaining agreement," App. to Pet. for Cert. at A-14, it concluded that plaintiffs' action did not arise under § 301 and was therefore not removable. It reached its conclusion by simply consulting the language contained on the face of the agreement. Finding no guarantee of permanent employment in the collective bargaining agreement that would provide plaintiffs a remedy for their layoff, the court held that their action was not based upon that agreement.[11] However, given that the labor agreement entails far more than its mere words, the court's conclusion could not properly be reached on the state of the record, especially in view of the fact that doubts concerning arbitrability must be resolved in favor of arbitration. *Warrior & Gulf, supra*, at 582-83.[12]

Of course, it would not be desirable to establish a rule requiring that evidence be taken in each case concerning the law of the shop prior to deciding whether a state-law claim was "really" a § 301 claim and therefore a basis for federal jurisdiction. Such a rule is rendered unnecessary, however, by recognition of the principle that the collective bargaining agreement "occupies the field" of the employment relationship between employers and

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[11] As discussed in Part II(B), below, the Ninth Circuit also erred in its view that the issue of whether a grievance arises under the collective bargaining agreement depends on whether the agreement provides a remedy for the challenged conduct.

[12] The collective bargaining agreement has been compared to basic regulatory legislation. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 24 (1957). It does not carry the analogy too far to compare the policies and practices of the shop to administrative regulations, or to compare arbitration decisions to administrative and judicial decisions interpreting the statutes and regulations. No one would suggest that in assessing the propriety of conduct governed by an administrative scheme it would be sufficient to consult only the basic statute; one would need to consult the regulations and interpretive decisions as well. Similarly, in determining whether the collective bargaining agreement covers a particular matter, it is necessary to evaluate the entire collective bargaining relationship.

union members, so that any contractual dispute over the terms and conditions of employment is necessarily based upon the collective bargaining agreement and therefore arises under § 301.

3. Even If All Individual Agreements Do Not Merge Into The Collective Bargaining Agreement, Interpretation Of Individual Contracts Is A Matter Of Federal Law.

Were it to be concluded that individual contracts are neither merged into the collective bargaining agreement nor extinguished by it, interpretation of those contracts must still be a matter of federal law. In *J.I. Case*, 321 U.S. at 339, the Court expressly stated that whether it would be permissible for individual contracts to *add* to the collective bargaining agreement was left "to be determined by appropriate forums under the law of contracts applicable, and to the Labor Board if they constitute unfair labor practices." At the time of the *J.I. Case* decision, the "law of contracts applicable" was state law. However, since that time, it has become firmly established that the "law of contracts applicable" is federal law. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

Section 301 is broad enough to include within its scope more than just collective bargaining agreements. For example, in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 699-700 (1966), the Court held that an action by individual employees for vacation pay was properly brought under § 301, despite the fact that "each worker's claim may also depend upon the existence of his individual contract of employment." The Court noted that in *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 (1962), it had rejected the view that "section 301 did not give the . . . courts jurisdiction over a suit brought by a union to enforce employee rights . . . characterized as . . . arising 'from separate hiring contracts between the employer and each employee.' " *See also Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) (stating that it was unnecessary to decide whether a strike settlement agreement was a collective bargaining agreement in order to hold that it was a contract for purposes of § 301).

The broad scope of § 301 was recently reaffirmed by this Court in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). At issue in

Lueck was the question whether an action for bad-faith handling of an insurance claim under a disability insurance plan included in a collective bargaining agreement was preempted by § 301. The Wisconsin Supreme Court had held that the action did not arise under § 301 because a § 301 suit arises out of a violation of a collective bargaining agreement, while the plaintiff's claim was a tort claim of bad faith, which, under Wisconsin law, is independent of the contract. Because of the potential for interference with the federal interest "in interpretive uniformity and predictability," however, this Court held that any valid action that the plaintiff could bring must be characterized as based on § 301. The Court stated:

> If the policies that animate § 301 are to be given their proper range, . . . the preemptive effect of § 301 must extend beyond suits alleging contract violations. *These policies require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy.'*

471 U.S. at 210-11 (emphasis added).[13]

The Ninth Circuit's view that plaintiffs' action was not a § 301 action because it was not expressly predicated on the collective bargaining agreement is error. As the Court stated in *Lueck*, § 301 extends beyond suits alleging violations of the collective bargaining agreement. Regardless of the fact that plaintiffs rely on an asserted "individual contract," federal law requires that all of the rights and obligations of the parties—that is, "*the whole employment relationship*," *Warrior & Gulf*, 363 U.S. at 579—be governed by federal law.

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[13] Plaintiffs argue that *Lueck* involved only the issue of preemption and therefore provides no support for a removal argument. Opp. to Pet. for Cert. at 3-4. However, the opinion in *Lueck* not only stated that Lueck's state-law claim was preempted, it also stated that any valid claim that he could bring must arise under § 301. The latter statement means that Lueck's action was removable.

II

AFFIRMANCE OF THE JUDGMENT OF THE NINTH CIRCUIT WOULD HAVE A DEVASTATING EFFECT ON COLLECTIVE BARGAINING RELATIONSHIPS.

It has been persuasively argued that it is the establishment of a "system of private law to govern the employer-employee relationship," rather than the mere opportunity to improve the terms and conditions of employment, that is the primary significance of collective bargaining. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 721 (1973). The Ninth Circuit's restrictive view of the collective bargaining agreement diminishes the scope of this system of private law, thereby destroying the comprehensiveness of the labor agreement. This diminution is contrary to federal labor policy and threatens serious interference with the statutory purpose of promoting industrial peace by stabilizing labor relationships. *See United Association of Journeymen v. Local 334, United Association of Journeymen*, 452 U.S. 615 (1981). *See also United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960) ("Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.").

At least three fundamental principles underlying the federal labor policy are implicated by the Ninth Circuit's holding: (1) the principle of exclusive representation; (2) the principle of the primacy of arbitration; and (3) the principle of interpretive uniformity. Each of these principles is discussed separately below.

A. The Decision of the Ninth Circuit Runs Counter to the Statutory Policy of Exclusive Representation.

One of the bedrock principles of the national labor policy is the principle of exclusive representation. The genesis of that principle is § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), which provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

In describing the majority rule provisions, Senator Wagner, the author of the Act, stated: "Without them the phrase 'collective bargaining' is devoid of meaning . . ." 79 Cong. Rec. 2372 (1935). A corollary of the principle that the union is the exclusive representative of all employees is that the employer may "no longer bargain directly or indirectly with the employees." *General Electric Co.*, 150 NLRB 192, 194 (1964), *enf'd*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). *See also Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 63-65 (1975). An employer who bypasses the union and bargains with employees violates its duty to bargain under section 8(a)(5). *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Pacific Intercom Co.*, 255 NLRB 184 (1981), *enf'd*, 679 F.2d 900 (9th Cir. 1982).

Congress' purpose in establishing the principle of exclusive representation was "to secure to all members of the unit the benefits of their collective strength and bargaining power." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. at 62. The voice of the union is most powerful when it speaks for all, and the willingness of an employer to agree to terms must be heightened by the knowledge that, by entering into a collective bargaining agreement, it is not only creating obligations but also *limiting* obligations. The Ninth Circuit's decision weakens the status of the union as exclusive representative of the employees by granting employees the power, while they are outside the bargaining unit, to order their own relations with the employer not only while they remain outside the unit, but also after they have entered it.

The circumstances of this case demonstrate the adverse effect on the bargaining relationship that would result from acceptance of the Ninth Circuit's analysis. When the decision to close Caterpillar's plant was made, Caterpillar engaged in bargaining with the union over the effects of the closure. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The record

reflects that, as a result, Caterpillar and the union entered into two letters of Agreement, Exhibits C & D, App. to Pet. for Cert. at A-81, A-82, and one Memorandum of Understanding, Exhibit E, App. to Pet. for Cert. at A-91. Although an employer is obligated to bargain over the effects of plant-closure decisions, it is not obligated to make concessions to reach agreement. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (the NLRB may not compel agreement when the parties themselves are unable to agree). If the employer cannot know whether any obligations it undertakes are its exclusive contractual obligations—that is, if it does not know whether it is dividing up the whole pie or instead simply a piece of the pie, with the remainder of the pie to be divided up later in state contract actions—its willingness to make concessions to the union would be greatly diminished.[14]

An employer's reluctance to enter into agreements with unions is not limited simply to the "effects bargaining" discussed above; it would extend as well to collective bargaining agreements in general. If employers no longer have the assurance that the collective bargaining agreement reflects their entire contractual obligation to their employees—the collective bargaining agreement acting merely as a "floor" to their obligations—then, as above, employers may well either hold more of the pie in reserve and grant less to the union or simply be more reluctant in general to reach agreement with the union on *any* terms. Thus, an increase in strikes and labor instability predictably would follow from the employer's knowledge that it is assuming all of the obligations contained in the agreement without a correlative limitation on the rights of employees.

[14] This problem is exacerbated by the fact that because these contracts are "implied in fact," the employer typically does not know that the obligations have been created.

B. The Decision of the Ninth Circuit Undermines the National Labor Policy Favoring Arbitration.

The national labor policy is built on the foundation of private dispute resolution.[15] To a large extent, this is a consequence of the generality and flexibility of the collective bargaining agreement. Cox, 57 Mich. L. Rev. at 23. As this Court has recognized, "[a]rbitration is the means of solving the unforeseeable by molding a system of private law *for all the problems which may arise* and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Warrior & Gulf*, 363 U.S. at 581 (emphasis added). If every dispute between employer and employee could be brought in court, the courts would be transformed into personnel boards, displacing the expert chosen by the parties for that purpose—the arbitrator. Consequently, "the means chosen by the parties for settlement of their differences under a collective bargaining agreement [must be] given full play." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

The arbitrator's charter is a broad one. Although his award is "legitimate only so long as it draws its essence from the collective bargaining agreement," *United Steelworkers of America v. Enterprise Wheel*, 363 U.S. 593 (1960), his "source of law is not confined to the express provisions of the contract, as the industrial common law . . . is equally a part of the collective bargaining agreement although not expressed in it." *Warrior & Gulf*, 363 U.S. at 581-582. Contrary to the Ninth Circuit's view, it is not possible to assess the rights and obligations of the parties to a collective bargaining agreement simply through a cursory review of the written agreement. Rather, "the labor arbitrator necessarily pours meaning into the general phrases and interstices of a document written somewhat in the generalities of basic regulatory legislation." Cox, 57 Mich. L. Rev. at 23. Moreover, arbitration is

[15] Section 203(d) of the Labor Management Relations Act, 29 U.S.C. 173(d), provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

more than the resolution of isolated grievances; it is "a part of the continuous collective bargaining process." *Warrior & Gulf*, 363 U.S. at 581.

The usurpation of the arbitrator's role is highlighted by the nature of the claim at issue in this case, since the elements that would establish an implied contract under state law are the same factors to which the arbitrator would look to discover the "common law of the shop." Under California law, in determining whether an implied contract exists, the trier of fact is to consider the following:

> the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.

Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917 (1981).[16] The arbitrator has a similar charge, in that he is to consider "the practices of the industry and the shop" in determining the scope of the collective bargaining agreement. These practices are "the flesh and blood which gives [the agreement] meaning." Cox, 57 Mich. L. Rev. at 24. The potential overlap of function between court and arbitrator is accentuated by the suggestion of the California Court of Appeal in *Pugh* that it would be "useful" for courts considering implied-contract claims to consult arbitration decisions. 116 Cal. App. 3d at 311 n.26.

Nonetheless, the Ninth Circuit has already accepted the view that this is a nonarbitrable dispute, as reflected in its statement that "no provision of the agreement can even arguably be construed to provide a remedy for their complaint." But whether the agreement provides a remedy for challenged conduct is surely not the test for determining arbitrability. Otherwise only meritorious grievances would be arbitrable. Such a rule would go far beyond the discredited *Cutler-Hammer* doctrine under which a court

[16] Examination of plaintiffs' complaint shows that these are precisely the factors they relied on to make out their claims. App. to Pet. for Cert. at A-42-50.

would decline to order arbitration if it determined that the meaning of the provision sought to be arbitrated was "beyond dispute." *See American Mfg. Co., supra*, at 566-67 (referring to the *Cutler-Hammer* doctrine as having "a crippling effect on grievance arbitration").

The view that the availability of a remedy through arbitration is relevant to the question of preemption was explicitly rejected in *Lueck*, 471 U.S. at 215-216 & n.10, in which the Court responded to Lueck's counsel's statement that he was "going for something that . . . the contract does not provide for," as follows:

> [I]f the arbitrator ruled that the labor agreement did *not* provide such relief expressly or by implication, that too should end the dispute, for under Wisconsin law there is nothing that suggests that it is not within the power of the parties to determine what would constitute "reasonable" performance of their obligations under an insurance contract.

Thus, the absence of a remedy under the labor agreement does not place the dispute outside the scope of § 301.

Although the question of arbitrability is one for the court, a court must order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," with doubts to be resolved in favor of arbitration. *Warrior & Gulf*, 363 U.S. at 582-83. A court exceeds its power when it addresses the question whether the collective bargaining agreement provides a *remedy* for the complained-of conduct, since "if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception." *Id.* at 584.

Union employees who believe their layoff as a result of a plant closure was wrongful must file a grievance challenging that decision. It is then for the arbitrator to decide whether the grievance is meritorious. In reaching his decision, the arbitrator may consult all of the circumstances offered by the employees to support their claim, but his decision must ultimately be based upon the collective bargaining agreement. The Ninth Circuit's decision, usurping the power of the arbitrator, should be reversed.

C. The Decision of the Ninth Circuit Undermines the National Labor Policy Favoring Interpretive Uniformity.

Since this Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), the substantive law to be applied in § 301 suits is federal law, "which the courts must fashion from the policy of our national labor laws." Although state courts have concurrent jurisdiction over § 301 actions, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), "substantive principles of federal labor law must be paramount in the area covered by the statute," *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). The right to remove cases involving such issues "is but one aspect of the primacy of the federal judiciary in deciding questions of federal law." *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. at 560.[17] Preemption of state law was held justified in *Avco* because uncertainty concerning the substance of rights would tend to exert a disruptive influence upon both the negotiation and the administration of collective bargaining agreements. *Id.*

Given the recent development in a number of states of various causes of action for "wrongful discharge,"[18] application to the collective bargaining relationship of state-law principles may have an even more severe impact on such relationships than the Court could have anticipated when it issued its decision in *Lucas Flour*. As previously described, California has recognized a cause of action for breach of implied contracts based upon such circumstances as longevity of employment, statements in personnel policy manuals, practices of the employer and of the industry, and favorable performance reviews. A number of other states have recognized similar causes of action. *See, e.g., Toussaint v. Blue*

[17] Although plaintiffs suggest that state courts are as competent as federal courts to resolve issues of federal law, Opp. to Pet. for Cert. at 7, if they truly believed that state and federal courts would resolve the federal issues presented by this case in the same way, it is doubtful that they would have expended so much effort in trying to avoid federal jurisdiction.

[18] *See generally* Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law. 1 (1984).

Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983). Other states, however, have declined to recognize such a cause of action. *See, e.g., White v. Chelsea Industries, Inc.*, 425 So.2d 1090 (Ala. 1983); *Muller v. Stromberg Carlson Corp.*, 427 So.2d 266 (Fla. App. 1983); *Joachim v. AT&T Information Systems*, 793 F.2d 113 (5th Cir. 1986) (applying Texas law).

This difference in state law has a profound effect on collective bargaining relationships under the Ninth Circuit's view: it means that gaps in collective bargaining agreements have a different meaning depending upon where the collective bargaining agreement is being applied.[19] The fact that plaintiffs' claims are arguably not addressed by the collective bargaining agreement means that they may have certain rights under California law. In fact, there is nothing to prevent virtually any employee covered by a collective bargaining agreement who has ever been outside the bargaining unit from bringing an implied contract action, and, as long as the events that form the basis of the implied contract action occurred prior to entry into the bargaining unit, then the contract action would be governed by state law.[20]

On the other hand, if plaintiffs were in Florida, the silence of the collective bargaining agreement would not allow them to bring a state-law contract action. Thus, the significance of "gaps"

[19] There is a certain irony presented by this case. State wrongful-discharge principles evolved to a large extent out of the perceived need to accord unrepresented employees the same kinds of job-security guarantees enjoyed by represented employees. *See Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d at 320-21. These principles have evolved to such an extent, and the remedies provided are so generous, that it is now perceived as "unfair" for represented employees to be "deprived" of the benefit of state-law actions. *See, e.g., Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 106 S.Ct. 278 (1985) (only "incomplete" remedy of reinstatement and back pay available through arbitration).

[20] It is worth noting that factual disputes concerning the course of negotiations or the practices of the shop will then be resolved by a jury in the first instance, rather than an arbitrator.

in the collective bargaining agreement differs depending upon state law. Yet these are the same "gaps" that this Court has stated are to "be left to be filled in [by the arbitrator] by reference to the practices of the particular industry or of the various shops covered by the agreement." *Warrior & Gulf*, 363 U.S. at 580. The meaning of these gaps must be a matter of federal law, since silence on an issue may be as reflective of the views and desires of the parties as words; what is implied is as significant as what is expressed.[21]

The gravity of the Ninth Circuit's action cannot be overemphasized. The implied contract that the court apparently was prepared to recognize was one purporting to guarantee job security. Job security, however, is one of the core issues of collective bargaining. According to one survey, 91% of collective bargaining agreements contain layoff provisions, and 94% contain provisions regarding cause for discharge. 2 *Collective Bargaining Negotiations and Contracts* (BNA) 40:1, 60:1 (1986). Thus, the contracts upon which plaintiffs rely govern a subject matter that is not merely peripheral to the matters over which employers and unions bargain, but is at their very center.[22]

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[21] *See NLRB* v. *South Central Bell Telephone Co.*, 688 F.2d 345, 352 (5th Cir. 1982) (interpretation of silence in a collective bargaining agreement is particularly difficult, "since their formation is typically characterized by intense bargaining and the final contract usually represents hard-fought negotiations and compromises").

[22] It bears noting that this case does not present the issue addressed by this Court in *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. 2380 (1985). That case involved the question whether a state law requiring certain minimum health benefits was preempted by the National Labor Relations Act. The Court held that the NLRA was primarily concerned with establishing the process for determining the terms and conditions of employment and not the particular substantive terms of the bargain struck and that therefore the state law was not preempted. The present case, on the other hand, does not involve a state's impositions of a just-cause requirement on all employment relationships, but rather an obligation that assertedly flowed as a matter of private contract from the employment relationship.

At least implicit in the Ninth Circuit's opinion is the view that state law is free to intrude in any area in which the collective bargaining agreement is silent. The Court should repudiate that view by holding that the entire relationship is governed by federal law and that any implied contract rights are creatures of federal law as much as are the rights expressed in the collective bargaining agreement. Thus, any action that is brought to enforce an implied agreement must be characterized as a § 301 action.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the brief of petitioners, the Chamber requests that the decision of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

JAMES C. PARAS*
JAMES E. BODDY, JR.
KINGSLEY R. BROWNE
MORRISON & FOERSTER
345 California Street
San Francisco, CA 94104
Telephone: (415) 434-7000
Attorneys for the Chamber of Commerce of the United States

*Counsel of Record

Of Counsel:
STEPHEN A. BOKAT
PAULA J. CONNELLY
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062

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AMICUS CURIAE

BRIEF

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No. 86-526

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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Petitioners

vs.

CECIL WILLIAMS, et al.,

Respondents

On Writ of Certiorari to
The United States Court of
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BRIEF OF AMICUS CURIAE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION (PELA) SUPPORTING RESPONDENTS

Paul H. Tobias
TOBIAS & KRAUS
911 Mercantile Lib. Bldg.
414 Walnut Street
Cincinnati, Ohio 45202
(513) 241-8137
Attorney for PELA

Joseph A. Golden
Sommers, Schwartz, Silver & Schwartz
26555 Evergreen Road
Southfield, Michigan 48076
Of Counsel

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TOBIAS & KRAUS
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414 Walnut Street
Cincinnati, Ohio 45202
(513) 241-8137
Attorney for PELA

Joseph A. Golden
Sommers, Schwartz, Silver & Schwartz
26555 Evergreen Road
Southfield, Michigan 48076
Of Counsel

QUESTION PRESENTED

Amicus will address the following question: Was removal improper where plaintiffs' state law claims did not arise under federal law or interfere with national labor policy?

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STATUTORY PROVISIONS

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BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICUS

Amicus Plaintiff Employment Lawyers Association (PELA) is a non profit tax exempt organization consisting of over 410 lawyers in 44 states who specialize in representing individual employees concerning employment and labor matters. Most of PELA members' clients are employees with claims of wrongful termination in violation of state or federal law. Many PELA attorneys represent individuals in the litigation of state claims where the defense raises federal preemption and removal issues. Amicus supports the Ninth Circuit decision. The current trend of state court decisions favoring individual employment rights represents a significant local policy. Here the federal interests are peripheral. The rights of plaintiffs are not derived from

or dependent upon any provision of the labor agreement. There is no conflict with the uniform national law of labor agreements. There is no disruption of the grievance arbitration machinery.

No federal question appears in the complaint and the preemption argument is merely defensive. Therefore amicus argues that the case is not removable to federal court.[1]

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[1] The parties to this case have consented to the filing of this amicus brief as per their letters of consent filed with the clerk of this Court.

STATEMENT OF THE CASE

Plaintiffs Respondents are thirteen former employees of Defendant Petitioner Caterpillar Tractor Company. While employed in salaried non union positions, Defendant made specific representations to Plaintiffs concerning their future job security. Subsequently Plaintiffs were returned to jobs in a collective bargaining unit and then were laid off as a result of the 1983 shut down of the Defendant's San Leandro facility.

Plaintiffs filed suit in Superior Court for the County of Alameda, California based on Defendant's breach of its representations of continued employment.

Defendant removed the claims to federal court based on its allegations that the promises of Defendant were "merged into and superseded" by the labor agreement as a matter

of federal law. The District Court then dismissed the claims and refused to grant Plaintiffs' motion to remand. The Ninth Circuit reversed, holding that the Plaintiffs' claim did not arise under the Defendant's labor agreement with the union and therefore there was no federal jurisdiction under Section 301(a) of the Labor Management Relations Act 29 USC Section 185(a). Since no federal question appeared from review of the complaint, the removal was held to have been improper. Remand to state court was ordered. This court granted certiorari on November 17, 1986.

ARGUMENT

I. PLAINTIFFS' STATE LAW CLAIMS DID "NOT ARISE" UNDER FEDERAL LAW, AND REMOVAL WAS THEREFORE IMPROPER

Title 28 USC Section 1441(a) provides for removal from State Court where the Federal Court has original jurisdiction. Under 28 USC Section 1331 federal courts only have jurisdiction over actions "arising" under federal law. For removal, the federal right must appear on the face of the complaint unaided by the answer. Gully v. First National Bank, 299 US 109 (1936). Ordinarily the preemption assertion is merely a defense, and not necessarily ground for federal jurisdiction. For removal the "federal question must appear in the complaint well pleaded". Franchise Tax Board v. Construction Laborers Vacation Trust, 463 US 1 (1983).

Section 301(a) of the Labor Management Relations Act 29 USC Section 185(a) only covers "suits for violation of contracts between an employer and a labor organization".

The Ninth Circuit correctly followed the "well pleaded Complaint" rule, noting that there was no federal Section 301 issue set forth in the Complaint. Indeed the Plaintiffs' claims arise independently and outside of the labor agreement.

Plaintiff's claims derive not from any collective bargaining agreement but from representations made when Plaintiffs were neither union members nor in the bargaining unit nor covered by the labor agreement. Thus there could be no colorable claim of a breach of a Section 301 "contract". For this reason there was no subject matter federal

jurisdiction. Removal was therefore improper. The Ninth Circuit was correct in ordering a remand to state court.

II. PLAINTIFFS' SIGNIFICANT STATE CLAIMS DO NOT INTERFERE WITH NATIONAL LABOR POLICY OR FEDERAL INTERESTS.

In recent years, the states have given more common law protection to the job interests of non-union employees.[2] The State of California is a leader in recognizing the importance of job security and requiring employers to live up to their verbal representations and promises. See Pugh v. See's Candies, 116 Cal. App3d 311, 321-322

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2 Leading cases are Mers v. Dispatch Printing Co., 19 OS 3d 100 (1985). Monge v. Beebe Rubber Co., 316 A2d 549 (NH 1974) Wooley v. Hoffman - La Roche 491 A2d 1257 (NJ 1985). Thompson v. St. Regis Paper Co., 685 P2 1081 (Wash 1984). Weiner v. McGraw Hill, Inc., 443 NE2d 441 (NY 1982). Toussaint v. Blue Cross Blue Shield of Michigan 402 Mich 579, 292 NW2d 880 (1980)

(1981) Cleary v. American Airlines, Inc., 111 Cal. App3d 443 (1980), Rulon-Miller v. I.B.M., Inc., 162 Cal. App3 241 (1984).

This Court has previously held that the states have a legitimate interest in enforcing individual contracts of employment as long as there is no significant infringement of federal interests. Belknap, Inc., v. Hale, 363 US 491 (1983). (Suit by strike replacements to enforce verbal promises of job security).

The Belknap case is one of several important restatements of this Court's respect for deeply rooted state causes of action. See also Linn v. Plant Guard Workers, 383 US 53 (1966) (slander) and Farmer v. United Brotherhood of Carpenters & Joiners, 430 US 290 (1977) (intentional infliction of emotional distress). This Court will not

interfere with these traditional areas of state regulation where the federal interest, as here, is peripheral.

In the case at bar, Plaintiffs' claims arise at a time and place totally outside the sphere of federal concern. The enforcement of these promises was of no legitmate interest to the union or bargaining unit members at the time of creation of the rights. If Plaintiffs had remained salaried employees at the time of the shut down, there would have been no issue. Neither the labor agreement, nor any federal law suggests that Plaintiffs' pre-existing vested state rights can be taken away merely because they entered the bargaining unit.[3]

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[3] This Court has long recognized that an employee has a "property" interest for due process purposes if there are promises, employment rules or other indicia of an implied-in-fact contract which create a legitimate claim of entitlement to a job. Perry v. Sinderman, 408 US 593 (1972). Thus the job rights of

The case of J.I. Case Co. v. NLRB, 321 US 332 (1943) dealt with individual contracts made during the term of the labor agreement for the purpose of undermining the union bargaining agent and is therefore distinguishable. Here, the union supports Plaintiffs' position. Here the Plaintiffs do not seek jobs or advantages conflicting with union members or union objectives or the collective bargaining process.

Defendants argue that permitting Plaintiffs' state law claim interferes with the federal policy favoring arbitration. Yet the labor agreement is quite narrow as to the scope of arbitration, stating that the

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plaintiffs herein can be considered "property" rights.

arbitrator "shall have the power only to apply and interpret the provisions of this agreement in reaching a decision". (A 71)[4].

The claims of Plaintiffs do not "arise" from any language in the agreement and are not subject to arbitration and are not arbitrable. The union could not request arbitration of these claims. In all events, the company could justifiably decline to arbitrate.

One rationale of Section 301 preemption is that the subject matter of labor agreements requires a uniform national law. Teamsters v. Lucas Flour Co., 369 US 95 (1962). Another is that individual suits may interfere with the union-employer machinery for resolving disputes. Republic Steel Corp. v. Maddox, 379 US 650 (1965). A third is judical deference

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4 Reference is to page of appendix to petitioners' brief

to arbitration. Steelworkers v American Manufacturing Co., 363 US 564 (1960). None of these reasons or policies apply to the case at bar. Here there was no disruption or interference with the arbitration procedures, or with the union's exclusive role as enforcer of the labor contract, or with a uniform interpretation of the contract.

The case of Allis Chalmers Corp. v. Lueck, 471 US 202, 105 S Ct 1904 (1985) is instructive because of its teaching that there is 301 preemption only if the "state claim was inextricably intertwined with consideration of the terms of the labor agreement". Lueck holds that state laws that "establish rights and obligations independently of the labor agreement" are not preempted.

Defendant can point to no provisions of the collective bargaining agreement that even bear upon the independent representations relied upon by Plaintiffs which predate their entry into the unit.

If Plaintiffs are denied their state rights, they are without any legal remedy. The employer would be able to renege on its solemn promises with impunity. There is no federal interest requiring such a harsh result.

CONCLUSION

Neither the labor agreement nor the union nor the arbitration machinery offers any protection or remedy for Plaintiffs' breach of promise claims. Permitting relief in state court and requiring Defendant employer to keep its word, does not undermine arbitration,

collective bargaining, or any federal labor policy. Under these circumstances Congress never intended "to preempt the field" so as to destroy significant state interests. Furthermore, there is nothing appearing in the complaint showing any action "arising" under federal law. In all events any preemption argument is purely defensive and not a ground for removal.

For all these reasons the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

Paul H. Tobias
Tobias & Kraus
414 Walnut Street
Suite 911
Cincinnati, Ohio 45202
(513) 241-8137
Attorney for Plaintiff
Employment Lawyers
Association (PELA)

Joseph A. Golden
Somers, Schwartz,
Silver & Schwartz
26555 Evergreen Road
Southfield, Michigan 48076
Of Counsel

AMICUS CURIAE

BRIEF

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No. 86-526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CATERPILLAR INC., ROBERT E. GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, HARRY MUNTZ, KEITH WHEELER, and DOES I through XX inclusive,
Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, JAMES MORETTI, ANDREW HORVATH, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE, and JOEL BRYAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, JAMES MORETTI, ANDREW HORVATH, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE, and JOEL BRYAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 91 national and international labor organizations with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. This case began as a suit in state court by a group of individuals based upon alleged individual contracts of employment that, according to the complaint, can be im-

plied under newly developing state law employment doctrine from certain representations made by the employer and other surrounding circumstances. The petitioners (defendants in the district court) contend that because respondents (plaintiffs in the district court) were covered by a collective bargaining agreement at the time of their allegedly wrongful termination (although not, according to the complaint, at the time of the controlling circumstances giving rise to the implied individual contracts), respondents must secure relief from that termination under the collective agreement or not at all. This contention, like others concerning the interaction of recently emerging state individual employment protections and the federal system of collective bargaining, merits careful judicial scrutiny. But the issue in this case is not whether the preemption contentions raised are correct, but whether these contentions entitle petitioners to remove this case to federal court. The answer to such preemption questions may well depend upon the precise nature of the state law cause of action, or upon the facts of the individual case. Yet, petitioners seek a result whereby consideration of the state cause of action pleaded in the complaint would be pretermitted and the federal questions decided first in a vacuum, divorced from both the nuances of evolving state law doctrines concerning individual employment rights and from the facts of individual cases as those facts may develop beyond the pleading stages. The result may well be to decide the federal question unnecessarily, or incorrectly. Viewed purely as a matter of effective judicial administration, then, the result for which petitioners contend has little to recommend it.

II. A. As a general rule, the jurisdiction of the federal district courts on removal of a case from state court on federal question grounds depends upon whether it appears from the plaintiff's "well-pleaded" complaint, and not from any defenses that might be raised, that a federal question is an essential element of the plaintiff's cause of action. This case focuses upon a corollary to the well-

pleaded complaint principle—the "artful pleading" or "complete preemption" doctrine—that precludes plaintiffs from avoiding removal by omitting to plead necessary federal questions. Relying principally upon *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), petitioners maintain that this suit had to be brought under § 301 of the Labor Management Relation Act, 29 U.S.C. § 185, and that the case is therefore one to which the *Avco* "artful pleading" doctrine applies. If this argument were accepted, *Avco* would largely swallow the "powerful doctrine" (*Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983)) that the plaintiff's complaint, and not the defenses raised, govern removal jurisdiction.

B. An examination of the history of the *Avco* doctrine demonstrates that, unlike petitioners approach in this case, *Avco* is consistent with, rather than opposed to, the basic principle that the plaintiff is master of his or her own complaint for federal jurisdictional purposes. Before *Avco*, this Court was faced with a choice of law question in cases avowedly seeking to adjudicated rights under a collective bargaining agreement: *viz.*, whether state or federal law is to be applied to such suits. That question was decided in favor of uniform application of federal law to cases in which the plaintiff's claim is based upon or derived from a collective agreement. Because that uniform federal law applies in both state and federal court, a necessary consequence of that choice of law decision is that a case filed in state court but directly based upon or derived from rights rooted in a collective agreement is removable as one of the " 'vast majority' of cases that come within [the arising under] jurisdiction [because] covered by Justice Holmes' statement that a 'suit arises under that law that creates the cause of action.' " *Merrell Dow Pharmaceutical Inc.* v. *Thompson*, —— U.S. ——, 106 S.Ct. 3229, 3233 (1986).

C. In this case, in contrast to *Avco*, respondents are not in any sense seeking to base an employer's liability upon a collective bargaining agreement. Instead,

respondents rely upon what they claim to be entirely separate state law individual employment contracts. Whatever the source of federal labor law preemption in this case, it is certainly not § 301 itself. For, contrary to petitioners' submission, § 301 does not displace, for organized employees, every form of protection under state law; it is state law causes of action "rooted in" the collective agreement that are displaced by § 301 of its own force. *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). And while it may well be that other aspects of federal labor law would preclude respondents in this case from recovering upon their asserted state law cause of action, upon close examination it becomes clear that the pertinent federal labor law preemption doctrines all enter this case *defensively*, as a basis for invalidating any individual employment contract that may at one time have existed. Since the respondents in this case are willing to stake their claim solely on their asserted state law individual employment contracts, respondents are entitled, under the jurisdiction regime established by Congress, to litigate as part of a unitary state law case any defense that their state cause of action is precluded by federal law.

ARGUMENT

I. Introduction

In recent years, California and other states have modified in various ways the traditional rule that, absent an express agreement to the contrary, all employment is at will, and that an employee may therefore be discharged for any, or for no, reason. These states have recognized at least three general varieties of limitations upon the at will doctrine.

First, like the federal government, most states have created by statute certain protections for employees; some of those statutory protections parallel federal protective laws—for example, protections against race or sex discrimination—while others—for example, protections for

those who assert rights under a workers' compensation statute—have no federal parallel.[1]

Second, many state courts have held that even where there is no statute expressly so stating, employees may not be discharged for reasons that violate some articulated state public policy, for example, protecting the public health. *See, e.g., Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984).

And, third, some states have implied from factors such as an employee's longevity on the job and the employer's articulated employment policy either a general covenant of good faith and fair dealing, or a more specific rule that a discharge can only be for just cause. *See, e.g., Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

This case concerns the question whether the defendant in a state law case of the last variety—*viz*, one based upon an implied promise of job security—may remove the case to federal court. Read at their broadest, the arguments of petitioners for removal (and of the *amici*

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[1] *See, e.g.*, the summary of California statutory protective labor legislation in *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980):

> Protection from discharge has been provided in a range of situations: discharge cannot be justified when the employee refuses to perform work under unsafe conditions (see Lab. Code, § 6311 and *Mason v. Lyl Productions* (1968) 69 Cal. 2d 79 . . .); or when the employee assets certain civil rights, including participation in elections and service as a juror (Lab. Code, § 1101, 230; Elec. Code, § 1650); or when the employee's wages are garnished (Lab. Code, § 2929); or when the employee seeks the protection of minimum wage laws for women and minors (Lab. Code § 1197) and *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69) . . . ; or to prevent discrimination due to age (Labor Code, §§ 1420.1 and 1420.15).

See also, e.g., California Federal Savings & Loan Association v. Guerra, —— U.S. ——, 55 LW 4077 (January 13, 1987) (upholding California statute protecting employees from discharge during a pregnancy disability leave of up to four months, even though federal law provides no such protection).

curiae supporting petitioners) go well beyond that question. Their common theme is that *whenever* an employee covered by a collective bargaining agreement claims the protection of state law against termination of his or her employment, the state proceedings can be immediately removed to federal court for a determination, necessarily based upon the pleadings alone, whether consideration of the state action should be cut short on the ground that the collective agreement—which may or may not provide parallel protection for the litigating employees—covers the field. *See* pp. 19-28, infra (discussing the degree to which petitioners' arguments reach beyond the present context to *any* form of state labor protection for employees covered by a collective agreement.)

The AFL-CIO is the last organization to minimize the benefits of collective bargaining, or to sanction the development of state law doctrines likely to undermine the effective operation of the system of exclusive representation instituted by the National Labor Relations Act, as amended. But the *only* question presented by this case is a jurisdictional and procedural one, *not* a substantive labor law question. The removal issue in this case is about the *judicial process* by which the federal labor law principles concerning the viability of state causes of action for wrongful discharge by employees represented by unions will be developed rather than about the principles themselves. A sound resolution of that removal issue is the necessary prelude to a sound resolution of the underlying substantive labor law issues.

Particularly while both the relevant federal labor law, and the state law, principles are still in the formulative stage, the judicial process petitioners seek is an undesirable one. For, as we indicate below, the rules governing the interaction between the federal system of collective bargaining and the growing state law system protecting the rights of individual employees are by no means clear. And, as we argue, and as the myriad of lower federal court cases cited in the various briefs filed in this

case indicate, the correct answer to the federal preemption question posed will often turn on nuances of the developing state law, as well as on the facts of the particular case before the court.

As a result, under petitioners' approach, there would be, not only a proliferation of federal litigation on individual employee rights—indeed, that has already occurred, as the sheer number of lower court cases decided in the last two or three years cited in the various briefs indicates—but, as well, a bifurcation of the state and federal issues in a case: The federal courts, under petitioners' approach, would decide the federal labor law issues first, based solely on the pleadings and uninformed by the state court's view as to whether the claim stated is viable under state law, and if so, on what theory and based upon what facts. The result would be unnecessary federal litigation, since many of the plaintiffs' claims might not have survived even as state law cases. And the result, as well, would be that the federal courts would have to speculate about the developing state law, predicting what state courts are likely to decide in order to evaluate the various theories of federal preemption presented by the parties.[2]

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[2] Deciding important federal preemption questions on removal also creates thorny problems concerning the appealability of the federal court's preemption decision: A remand order is generally not appealable. 28 U.S.C. § 1447(d). It is possible, however, that the preemption decision might nonetheless be appealable, under an implied exception to § 1447(d). *See Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1935); *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 277 (9th Cir. 1984). And, whether the merits of a preemption issue will be open in state court once decided in the federal court is also unclear. *See e.g., American Surety Co. v. Baldwin*, 286 U.S. 156, 166 (1932).

Thus, in a case in which the federal court remands after reaching the merits of a federal preemption question, the preemption decision could either be final for purposes of the case, with no opportunity to appeal; appealable through the federal courts and then final for purposes of the state court litigation after remand; or open on remand, with the necessity of relitigating, possibly inconsistently, the federal question upon which the jurisdictional question turns.

For example, in this case, it is suggested that *under California law* "[r]espondents cannot pick and choose among the factors that reflects the 'totality' of the employment relationship . . . [so that] [a] fundamental element in respondents' prima facie case for breach of an implied-in-fact contract will be an analysis of the collective bargaining agreement and its preemptive effect on the purported indicual promises." *Brief for Amici Curiae Merchants and Manufacturers Association and California Employment Law Council In Support of Petitioners* at 22. Consequently, it is argued, a federal question is an integral part of respondents' state law cause of action, as defined by the state, and the case is therefore removable. *E.g. Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *see* p. 12, n.6, *infra.*

The short answer to this contention is that the proposition of California law on which it rests is incorrect: "In pleading a cause of action on an agreement implied from conduct, only the facts from which the promise is implied must be alleged." *See* 2 Chadbourn, Grossman & Van Alstyne, *Cal. Pleading* § 1011, p. 159; *Youngman v. Nevada Irrigation Dist.*, 70 Cal. 2d 240, 74 Cal. Rptr. 398 (1969); *see also* 5 B. Witkin, *California Procedure, Third Edition* 512 (1985).[3]

Putting that aside, the California courts are surely in a better position than the federal courts to determine, on a demurrer for failure to state a cause of action, whether or not the plaintiffs in this case stated an adequate cause of action under the newly-developing state law of implied-in-fact employment contracts. If this proceeding is remanded to state court without deciding the merits of the preemption question, petitioners will have

[3] *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984), cited to the contrary by the *amici curiae* making this argument, did not fault the plaintiff for inadequately pleading a cause of action. Rather, that case simply granted summary judgment to the defendant employer when the employer came forward in defense with an express written contract inconsistent with plaintiff's alleged implied agreement.

the opportunity directly to test the contention that consideration of the collective bargaining agreement here is an integral part of the state cause of action; indeed, given respondents refusal to rely on the collective agreement, if petitioners prevail on that theory, the case will be dismissed as a matter of state law, with no need to reach any federal question at all.

Thus, the regime that petitioners suggest has little to recommend it as a matter of effective judicial administration. It is therefore not surprising that, as we now go on to show, petitioners' removal arguments are squarely inconsistent with the division of responsibility between state and federal courts that Congress has established.

II. While Petitioners' Various Preemption Arguments Raise Important Questions of Federal Labor Policy, Those Arguments Are All Defensive and Do Not Support Federal Court Jurisdiction On Removal

A. This Court recently summarized the pertinent principles governing federal question removal jurisdiction as follows:

> One powerful doctrine has emerged . . .—the "well-pleaded complaint rule"—which as a practical matter severely limits the number of cases in which state law "creates the cause of action" that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.
>
> > "[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914).
>
> Thus, a federal court does not have original jurisdiction over a case in which the complaint present a

> state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise . . . or that a federal defense the defendant may raise is insufficient to defeat the claim. . . . "Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." [Citation omitted]. [*Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983).]

The "powerful doctrine" embodied in the well-pleaded complaint rule has particular application to cases, such as this one, in which "federal law becomes relevant only insofar as it sets bounds for the operation of state authority." *Id.*, at 11.[4] Where that is the federal question usually

> [t]he most one can say is that a question of federal law is lurking in the background . . . A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states. [463 U.S. at 12, *quoting Gully v. First National Bank in Meridian*, 299 U.S. 109, 117 (1936).]

In this instance, respondents own statement of their claim did not allege only that they were terminated by

[4] While affirming that the well-pleaded complaint rule "has been correctly understood to apply in [all] situations" in which a purely defensive preemption claim is raised, the Court noted in *Franchise Tax Board* that in some preemption cases, that rule "may produce awkward results." *Id.* at 12. As we have already seen, however (pp. 4-9, *supra*), this is not a situation in which "neither the obligation created by state law nor the defendant's failure to comply are in dispute, and both parties admit that the only question for decision is raised by a federal preemption defense." *Id.* Rather, this is a situation in which it is far from clear that the plaintiffs will in fact prevail on their state law cause of action, and in which the nature of "the obligation created by state law," because of the nascency of the state law doctrine relied upon, is a subject for fair dispute. Thus, this is a situation in which a remand to state court is not only sound in law but sound in practical terms.

the employer upon closing of the plant in which they worked, nor would their complaint have been "well-pleaded" under California law if that was all that they had said. Such a complaint would only have explained the circumstances giving rise to respondents' cause of action, but would not have explained why respondents thought that they were entitled to recover from their employer. Rather, as they were required to do under California law, respondents stated a cause of action for breach of contract by pleading "(1) the contract . . . ; (2) plaintiff's performance . . . ; (3) defendant's breach . . . ; and (4) damage to plaintiff therefrom." 5 B. Witkins, *California Procedure*, *supra*, at 512, and cases cited. As is also required by California law, the complaint further specified "the nature of the contract with certainty," including who the parties to the contract were, when the contract was entered into, and the contract's pertinent terms (*id.*, at 509), and, because the contract relied upon is one implied in fact, alleged the particular " 'facts from which the promise is implied,' " (*id.* at 512, *quoting Youngman v. Nevada Irrigation Dist.*, *supra*).[5] In making the allegations necessary to state their claim, respondents did *not* in any way rely upon any agreement entered into between their employer and the union representing the bargaining unit in which respondents were employed at the time of their termination.

Under these circumstances, one would expect that the well-pleaded complaint rule would clearly preclude removal, whether or not petitioners choose to raise as a defense the contention that the individual employment contracts sued upon are precluded by "federal [labor] law set[ting] bounds for the operation of state authority." *Franchise Tax Board*, 463 U.S. at 11. Despite its force, however, the well-pleaded complaint rule as applied in the preemption context is subject to the

[5] Under the federal rules, similarly, a complaint in a contract action would ordinarily specify who entered into the agreement and when, and the pertinent terms of the agreement. *See, e.g.*, Fed. R. Civ. Pro. 84 and Appendix thereto, Form 12.

"independent corollary" that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Id.*, at 22, citing *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 339-40 (6th Cir., 1967), *affirmed*, 390 U.S. 557 (1968).[6] It is the scope of this "corollary" —known variously as the "artful pleading" or "complete preemption" doctrine—upon which petitioners rely in

[6] There is one other "corollary" of the well-pleaded complaint rule sometimes erroneously treated as an exception to that rule that bears mention at this point. *See, e.g., Brief of Amici Curiae Merchants and Manufacturers Association and California Employment Council In Support of Petitioners*, at 17-23. That refinement is the principle that federal question jurisdiction may lie where "it appears that some substantial, disputed question of federal law is a necessary element *of one of the well-pleaded state claims.*" *Merrell Dow Pharmaceutical Inc. v. Thompson*, —— U.S. ——, 106 S.Ct. 3229, 3235 (1986), *quoting Franchise Tax Board*, 463 U.S. at 2846 (emphasis supplied); *see also Merrell Dow*, 106 S. Ct. at 3239 (Brennan, J., dissenting) (quoting from *Smith v. Kansas City Title & Trust Co., supra*, 255 U.S. at 199, to the effect that *"where it appears from the bill or statement of the plaintiff* that the right to relief depends upon the construction or application of the Constitution or laws of the United States" (emphasis supplied), federal jurisdiction exists although the cause of action is created by state law).

As the italicized words indicate, the principle derived from *Smith v. Kansas City Title & Trust Co.* does not sanction departure from the rule that plaintiffs may define their cause of action as one governed solely by state law, and that federal defenses do not create "arising under" jurisdiction. Rather, the *Smith* line of cases simply indicates that under at least some circumstances (*but see Merrell Dow, supra*), where the plaintiff *chooses* to plead a state cause of action that *itself* incorporates, as a necessary element of the action, a federal law component, federal jurisdiction will lie.

For example, if the state law cause of action here alleged a state law individual employment contract guaranteeing plaintiffs certain special rights based on their seniority position as defined by the collective bargaining agreement, then it would be necessary to construe the seniority provisions of the collective agreement and the case would in all likelihood be removable as "arising under" federal law. Here, however, respondents are in no way relying upon the collective agreement as *either* the source of their claimed rights or as an element of their state cause of action.

arguing that removal is proper, that is at the core of this case.[7]

B. In considering that argument we note at the outset that petitioners' expansive view of the "artful pleading" doctrine would largely swallow the *Gully/Franchise Tax Board* principle that removal is improper where the federal preemption issue, albeit important, and quite possibly controlling, arises *only as a defense*.[8] For under petitioners' approach, a federal preemption defense would become a ground for removal *whenever* the defendant shows that there *may* be an *alternative* federal cause of action to the state cause plead in the complaint and that the federal road to relief is exclusive. This would be so even where, as here, the "well-pleaded complaint" is based upon a set of allegations *distinct from* those giving rise to the federal cause of action; here, a specifically alleged contract separate from the contract giving rise to federal jurisdiction. The result would be to permit a

[7] A question concerning the parameters of the "complete preemption" doctrine is presently before this Court in *General Motors v. Taylor*, Nos. 85-686 and 85-688. Respondent in that case argues that the "artful pleading" exception to the well-pleaded complaint rule should turn upon whether it is "obvious," or only arguable, that the plaintiff's state law cause of action is precluded by federal law. Brief for Respondent in Nos. 85-686 and 85-688, at pp. 10-21. Given the unsettled nature of the law governing the status of advantageous individual employment contracts entered into when the affected employees are unrepresented (*see* pp. 19-28, *infra*), application of the "obviousness" test would clearly lead to the conclusion that the present case is not removable. We do not discuss the "obviousness" approach further, however, because that approach is fully discussed in *Taylor* which is already *sub judice*.

[8] That a legal issue is a very important, and a complicated, one is not, of course, in itself a reason for regarding that issue as part of a plaintiff's state cause of action, or for permitting removal to federal court. *See Franchise Tax Board*, 463 U.S. at 4 ("The issue is an important one, which affects thousands of federally regulated trusts and all non-federal tax collections systems, and it must eventually receive a definitive, uniform resolution. Nevertheless . . . we hold that the lower federal courts had no jurisdiction to decide the question before us.")

defendant to restructure the plaintiff's lawsuit entirely, rather than to respect the plaintiff's choice of litigation strategies by deciding whether on the facts as articulated by the plaintiff, there is a viable state law case.

Some history regarding the application of the "artful pleading" doctrine in the labor law context is, we believe, the best starting place in considering whether that doctrine sweeps as broadly as petitioners claim. That history illustrates that the "complete preemption" doctrine as it has developed to this point, unlike petitioners' theory in this case, is compatible with the well-pleaded complaint rule, and with the principle inherent in that rule that removal may not be used to defeat a plaintiff's ability to structure his own lawsuit.

Section § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not in terms establish substantive rules of law; instead, on its face § 301 simply provides for federal court jurisdiction over suits based on or derived from collective bargaining agreements. Thus, to plead a cause of action under § 301 in federal court, one need only plead that a collective agreement exists and that the contract, or some duty derived from or based upon the contract, has been violated. *See generally Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985).

After § 301 was enacted, the major quandry regarding the section's enforcement was "the choice of law problem: [for example] in this suit under § 301, do we look to federal or state sources to determine the availability of specific enforcement as a remedy for breach of a promise to arbitrate?" *Local 205, United Electrical, Radio, & Machine Workers v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956). This "choice of law" question arose in a situation in which the parties agreed as to the operative facts whose legal significance was to be determined, but disagreed as to which jurisdiction's law was to be applied.[9] The pleadings reflected that a collective bargaining agreement existed; the threshold question to be decided was whether the existence of a breach and the propriety of various remedies for any such breach found was to be judged by reference to state law or to federal law.

[9] Similarly, where two parties from different states execute a commercial contract in a third state, a lawsuit alleging breach of the agreement will involve a determination as to which of the three states' common law of contracts applies. This is true even though the parties agree that there is indeed an enforceable contract with certain terms, disagreeing only on the meaning and consequences of those terms.

This Court, when faced with this question of "what is the substantive law to be applied in suits under § 301(a)" (*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957)), concluded that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws," (*id.*). Later cases made clear that this choice of law rule obtains whether a case in which the plaintiff seeks to adjudicate rights under a collective bargaining agreement is litigated in state, or in federal, court. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *see also Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). In either forum,

> [t]he possibility that *individual contract terms* might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. . . . Once the collective bargaining agreement was made, the possibility of *conflicting substantive interpretation* under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. [*Lucas Flour*, 369 U.S. at 103-04 (emphasis supplied).]

As this reasoning suggests, this Court's concern throughout the seminal cases concerning the "choice of law" question implicit in § 301 has been to assure that rights concededly based on collective agreements are adjudicated uniformly despite the variety of jurisdictions in which such suits may be brought.

In its basic character, *Avco Corp. v. Aero Lodge No. 735*, *supra*, was of a piece with the § 301 cases that preceded it. As in those cases, "[t]he heart of the complaint was a . . . clause in the collective bargaining agreement." 390 U.S. at 558. As the court of appeals in *Avco* recognized, it followed as a matter of settled law that, "the rights and claims arising from [the] collective bargaining agreement . . . arise under Federal law." 376 F.2d at 560. In turn, because "the claim under this collective bargaining statute [was] one arising under the 'laws of the United States' ", the case could be removed from state to federal court. 390 U.S. at 560. Thus, the fundamental reason *Avco* was removable was that, like the " 'vast majority' of cases that come within [the arising under] jurisdiction [it is] covered by Justice Holmes' statement that a 'suit arises under that law that creates the cause of action.' " *Merrell Dow Pharmaceutical*, 106 S. Ct. at 3233.

Avco rests, in other words, on the recognition that it is the precise office of § 301 *as applied to cases in which the plaintiff's claim, as stated in a well-pleaded complaint, seeks application or interpretation of a collective bargaining agreement*—and whether denominated a suit for breach of that agreement or not, *see Allis-Chalmers v. Lueck*, *supra*—to make the case "purely a creature of federal law," and therefore to replace a cause of action created and governed by state law with one created and governed by federal law. *Franchise Tax Board*, 463 U.S. at 23-24.[10] Thus, as the Ninth Circuit held in this case,

[10] In *Franchise Tax Board*, 463 U.S. at 23 n.25, the Court described *Oneida Nation v. County of Oneida*, 414 U.S. 661 (1974) as being of "similar effect" on the matter of federal jurisdiction to *Avco*. In that case, the Court concluded that the history of Indian tribal land rights demonstrates that a cause of action concerning an Indian tribe's right to possess ancient tribal lands is one as to which "the controlling law [is] federal; and absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." 414 U.S. at 674. Under these circumstances, said the Court, a complaint alleging a present right to possession of Indian tribal lands necessarily

there is in a breach of contract case "complete preemption" of the kind recognized in *Avco only* if the facts stated in the well-pleaded complaint—which, if properly pleaded, include some indication of what contract is being sued upon[11]—state "a cognizable federal cause of action", and one that is *exclusively* federal. Pet. App. A-9.[12]

"asserts a present right to possession under federal law," as opposed to a situation in which "the underlyling right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation." 414 U.S. at 675. Thus, like *Avco*, *Oneida Nation* involved a situation in which the question was whether, given the facts as alleged by the plaintiff, the source of law governing the plaintiff's claim is exclusively federal or exclusively state.

[11] The "well-pleaded' portion of the "well-pleaded" complaint rule does require that the complaint set out the requisite elements of the cause of action, and not omit necessary allegations because those allegations might alter the jurisdictional determination.

Thus, for example, if an employee simply sues in state court for breach of contract and does not specify who entered into the alleged contract or when, a defendant might be able to introduce documentation indicating that the only agreement possibly applicable is the collective bargaining agreement between the employer and a labor organization, and that the complaint is therefore necessarily based upon that agreement although no such reliance is expressly conceded on the face of the complaint. If the employee does not at that point allege facts sufficient to survive a motion to dismiss, or equivalent state law motion, indicating the existence of an individual agreement not dependent upon the collective agreement, the complaint would presumably be recognized as one in truth based upon the collective agreement despite the attempt to conceal that fact, and the case would be removable to federal court.

Such a situation, however, is quite different from the situation in which the plaintiff can meet his or her pleading burden by alleging specifically enough a contract distinct from the collective agreement, and the defendant's argument is that any such separate contract is void.

[12] The Ninth Circuit's opinion at points seems to go further and to suggest that the removal issue somehow turns upon whether the plaintiff is likely to *prevail* under the collective bargaining

C. This case, as we have emphasized, is not one like *Avco* in which a collective bargaining agreement is at "the heart of the complaint" (390 U.S. at 558). Rather, respondents' complaint rests on their rights under an agreement entirely separate from the agreement between their employer and the union that represented them at the end of their employment with Caterpillar. And peti-

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agreement upon his or her federal cause of action. We do not embrace any such implication, nor need we do so to prevail in this case.

For example, the Ninth Circuit indicated that it was relevant to its removal decision "that no provision of the [collective bargaining] agreement can even arguably be construed to provide a remedy for [respondents'] complaint." Pet. App. A-16. On our view of the *Avco* doctrine, that reasoning is unsound.

Whether or not respondents *could* have pleaded a cause of action based upon breach of the collective agreement, the fact is that they did *not* choose to do so. Rather, respondents are content to win or lose the case they have brought solely on the basis of breach of an alleged agreement *entirely separate* from the collective agreement. Should the employer prevail in state court on the claim that any rights respondents have arise from the collective agreement, then respondents will recover nothing. But that is a chance respondents were entitled, as masters of their own complaint, to take, and the question whether they could have, had they wished to do so, also claimed rights under the collective agreement is irrelevant. And it is a litigation choice respondents would have been entitled to make even if, as may not be true here, it seemed likely that they *could* obtain some or all of the relief they sought on the basis of the collective agreement.

Thus, the Ninth Circuit was if anything too narrow in its view of the sweep of the well-pleaded complaint rule. Petitioners are correct in contending that the removal question should not turn on whether or not relief is available under the collective bargaining agreement (*see* Pet. Br. 14-22), but the proper rule is the opposite from the one for which petitioners contend: While petitioners fault the Ninth Circuit for not adopting a rule that this case is removable without regard to whether or not relief is available under the collective agreement, the correct approach would have been to remand the case on the present complaint without considering at all what relief may be available under the collective agreement. In other words, the Ninth Circuit's two-part removal analysis gives those in petitioners' position *more*, not less, of a possibility of succeeding on removal than they are properly due.

tioners' preemption argument is not that respondents' cause of action for breach of their individual agreements should go forward but under federal, rather than state, law; the argument, rather, is that "as a matter of federal substantive labor law" (Pet. App. A-36), any state law agreements between the parties are simply void and unenforceable as such, although their terms may in some sense have become part of the collective bargaining agreement between the union and the employer (*id.*).

In other words, respondents are content to have their case stand or fall on the validity of the individual agreements that they allege exist, foregoing any alternative claims they may have under any collective bargaining agreement. And petitioners are contending that under these circumstances, respondents case must fail, since any individual employment contracts that may have been entered into either were never valid or have become void. The Ninth Circuit concluded, correctly, that respondents' arguments are therefore purely defensive, "raised to defeat the plaintiffs' claims grounded in those independent contracts" (Pet. App. A-16), and hence do not support removal.

In determining why this is so, it is important to recognize that § 301 itself does not preempt respondents' state law contract claim. That provision, as interpreted by this Court, establishes that federal common law governs the application and interpretation of collective bargaining agreements between employers and unions. Section 301, in contrast, says nothing of its own force about whether separate individual agreements between employers and employees are valid under the overall federal labor law. Petitioners, to be sure, suggest that all "employment-related matters involving unionized employees" are to be determined under a federal common law fashioned under § 301. Pet. Br. at 26. But this Court expressly held to the contrary in *Allis-Chalmers v. Lueck*, 471 U.S. at 211-12:

> [N]*ot* every dispute concerning employment, or tangentially involving a provision of a collective bar-

gaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in the labor contract. . . . *Clearly, § 301 does not* grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law . . . or *establish rights and obligations, independent of a labor contract.* [Emphasis supplied.] [13]

Thus, if respondents' state law cause of action is indeed governed by federal law, that law must be one other than § 301 itself. And when the alternative labor law rules upon which petitioners ground their arguments are surveyed, it becomes clear that aspects of federal labor policy may well be pertinent to, or even dispositive of, this lawsuit, *but only as matters of defense*, and not, in any way, as the substantive law governing the elements of respondents' well-pleaded cause of action.

1. Initially, petitioners locate the relevant "substantive labor law" in the principle of exclusive representation stated in § 9(a) of the NLRA, 29 U.S.C. § 159(a). Pet. Br. at 24-25. While petitioners to some extent overstate that principle,[14] their statement that it would have

[13] Petitioners attempt to turn part of this passage to their advantage. Pet. Br. at 30. They do so by ignoring the fact that the passage, and the immediately succeeding one in *Allis-Chalmers v. Lueck*, upon which petitioners also depend, contrast rights under a "labor contract," not *all* rights under contracts, with other employment-related rights. And, while § 301 defines "labor contracts" broadly (*see, e.g. Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962)), that section is limited to agreements between employers and labor organizations, and does not cover agreements between employers and individual employees.

[14] For example, petitioners claim that "unions are free—as in this case—to bargain away individual rights in exchange for benefits important to the majority." But the two cases cited in support of that proposition—*Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-84 (1956) and *NRLB v. Rockaway New Supply*, 345 U.S. 72, 75 (1953)—both involved waiver by the union of a right to take collective economic action. The authority of unions to waive NLRA

been an unfair labor practice for the employer to negotiate or contract directly with the respondents while the latter were in an organized bargaining unit is, in general terms, quite correct, and is a critical aspect of the NLRA's collective bargaining regime:

> [I]t is a violation of the essential principle of collective bargaining and an infringement of the [NLRA] for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours, and working conditions. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or a majority, would be subversive of the mode of collective bargaining which the statute has ordained. [*Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684-85 (1944); *see also, Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).] [15]

rights not connected to concerted activity is however, more limited. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705-07 (1983). And both the federal and state governments may create individual rights for employees that are not waivable by their exclusive representative. *Metropolitan Life Ins. Co. v. Massachusetts*, —— U.S. ——, 105 S. Ct. 2380, 2397 (1985); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). As the foregoing cases show it is simply not true that "[n]ational labor policy . . . holds that all employment-related matters involving unionized employees should be resolved 'through the processes of conference and collective bargaining between employers and the representatives of their employees.'" Pet. Br. at 26.

[15] Again, there is a caveat to this principle recognized by this Court's cases: The NLRA's exclusive representation system is not offended where, as is the practice in many industries, the collective bargaining agreement is limited to minimum employment standards with the union consenting to individual negotiations for those employees able to command better terms. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) ("of course, where there is great variation in circumstances of employment or capacity of employees, it is possible

For two reasons, however, the major NLRA principle established by *Medo* has little pertinence to the issue before this Court.

First, from the filing of the complaint until and including the framing of the Question Presented to this Court in the Petition for a Writ of Certiorari, this case has been understood—properly, we believe—as involving individual agreements entered into while respondents were *not* in an organized bargaining unit, albeit with effects persisting into the period during which respondents were in such a unit.[16] Thus, there was, on the allegations of the present complaint, no unfair labor practice involved in the formation of the state law contracts sued upon.

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for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining"); *Order of Railroad Telegraphers v. Rail Express Agency*, 321 U.S. 342, 347 (1944) ("It may be agreed [in a collective agreement] that particular situations are reserved for individual contracting, either completely or within prescribed limits").

[16] Petitioners dispute this characterization of the case for the first time in their Brief to this Court. We believe that a fair reading of the complaint indicates that the representations made by the employer while respondents were in an organized bargaining unit referred to there were merely confirmations of promises made while respondents were not in the unit. Moreover, whether this is true or not, petitioners cannot at this stage change factual premises to a degree inconsistent with the Question Presented to this Court in the Petition for a Writ of Certiorari; that Question is whether an individual who "*prior to entering the bargaining unit* . . . negotiated an individual contract" can resist removal of a suit on that contract. Cert. Pet. at i (emphasis supplied). *See* Rule 21 of this Court's Rules ("[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.")

At any rate, while, as we show in the text, negotiating an individual agreement with a member of an organized bargaining unit does raise different, and more settled, substantive labor law questions than the questions raised by the entry into such a unit of an individual who is party to an individual agreement, as also shown in the text, we do not believe that this difference is pertinent to the question of federal jurisdiction presently before the Court.

Second, and more fundamentally, whatever its validity, the assertion that an individual employment contract entered into as a result of unlawful individual negotiations is invalid for that reason is clearly a *defensive* one.[17] The contention is in essence that because entered into in violation of the NLRA, the contract is illegal and unenforceable. *Cf.* Fed. Rule Civ. Pro. 8(c) (illegality in an affirmative defense); *Kaiser Steel Co. v. Mullins*, 455 U S. 72 (1982); J. Calamari & J. Perillo, *The Law of Contracts* (1970) at 557 (where a contract, otherwise substantively valid, was entered into in violation "of [a] law forbidding contracting on Sundays, the "general rule [is] that the violation of . . . statute makes the contract illegal and the court will leave the parties where it finds them."). If such a result were to obtain, it would not be because of a private right "arising upon or derived from the contracts between [an employer] and its employees" but because of a "public right" derived, for "distinct and separate reasons," from the NLRA. *National Licorice Co., supra*, 309 U.S. at 363-64. And this "defense of illegality" (*Kaiser Steel v. Mullins*, 455 U.S. at 82) would not entail an evaluation of respondents' individual con-

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[17] On the merits of the question, this Court has indicated that while individual employment contracts that are "the products of unfair labor practices" are unenforceable by the employer who committed the unfair labor practice (*National Licorice Co. v. NLRB*, 309 U.S. 350, 359 (1940)), that fact is not necessarily dispositive of the *employees'* right to enforce any portions of the contract they regard as beneficial to them (*id.*, at 365) (the NLRB's determination that individual employment contracts entered into as the result of an employer's unfair labor practices may not be relied upon by the employer "does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such an adjudication"). In fact, this Court, in *National Licorice*, specifically amended the Board's order in that case, which had ordered notices announcing that the unlawfully entered individual contract with the employees were "void and of no effect." The Court's amendment made clear that the Board's determination was "without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts." *Id.* at 367.

tract claim on its own particular merits, but a consideration of general public law NLRA principles.

2. Petitioners' second major argument for federal labor law preemption in this case rests on the supposed principle that "independent contracts which attempt to set employment conditions different from those established in the collective bargaining agreement are subsumed by that agreement [so that] . . . a collective bargaining agreement subsequently negotiated would eliminate preexisting individual agreements." Pet. Br. at 32 & n.7. While petitioners are less than clear about the source of this inflexible rule, their citation to *J.I. Case Co., supra*, and to *Allis-Chalmers v. Lueck*,[18] suggests two possibilities. The first is, once again, the NLRA, whose effect on preexisting individual employment contracts was discussed in *J.I. Case*, and the second is the subsequently-negotiated collective bargaining agreement itself, as a private agreement capable of waiving any rights previously held under an earlier private agreement.

J.I. Case involved a situation in which, before there was a certified bargaining representative, the employer entered into individual contracts of employment with a number of its employees. When a union was later organized and certified as the exclusive bargaining representative, the employer used the existence of the individ-

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[18] Despite petitioners heavy reliance upon *Allis-Chalmers v. Lueck* that case has little pertinence here. Unlike this case, *Lueck* involved a suit whose genesis *was*, as pleaded by the plaintiff, in the collective bargaining agreement. For in *Lueck*, the dispute concerned the handling of a claim for disability benefits that Lueck claimed were due him *under the collective agreement*. Thus, while Lueck attempted to frame his case as one in tort, the Court concluded that the claims "derived from the rights and obligations established by the [collective bargaining] contract." 471 U.S. at 217; *see also id.* ("there is no indication in Wisconsin law that the tort is anything more than a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available.").

ual agreements as a ground for refusing to bargain with the union "in any matter effecting rights and obligations under the individual contracts". 321 U.S. at 34. The Court held that there *is* "a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence or hiring, but also in the sense of a completely individually bargained contract" (321 U.S. at 337),[19] but that

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to limit or condition the terms of the collective agreement. . . . It is equally clear since the collective agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. [321 U.S. at 337-38.]

The Court stated the limits of that holding as follows:

> Individual contracts cannot subtract from collective ones, and whether under some circumstance they may add to them in matters covered by the col-

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[19] For example, said the *J.I. Case* Court, where "the negotiation [for a collective bargaining agreement] may be delayed or deadlocked . . . in the interim express or implied individual agreements may be held to govern." *Id.* As this example illustrates, it is *not* true, nor do we understand petitioners to argue, that the certification of a collective bargaining representative or the entry of an employee into an organized bargaining unit in itself voids any preeexisting individual employment contracts. Rather if, as a matter of national labor policy, such contracts are nullified or superceded, it is upon the execution of a collective bargaining agreement covering the unit. *See Roberts v. Automobile Club of Michigan*, 360 N.W. 2d 224 (Ohio Ct. App. 1984), *cert. denied*, 55 LW 3258 (October 14, 1986).

> lective bargain we leave to be determined by appropriate forums under the law of contracts applicable. [321 U.S. at 339.]

Consistent with that limited holding (and consistent with *National Licorice*, 309 U.S. at 365-67) the *J.I. Case* Court amended the National Labor Relations' Board order to make clear that, as far as the NLRA is concerned, preexisting individual contracts are proscribed only so far as those contracts "forestall collective bargaining or deter self-organization", and "that such discontinuance of the contract is without prejudice to the assertion of any legal rights the employee may have acquired under such contract *or to any defense thereto by the employer.*" 321 U.S. at 342 (emphasis in the original).

This Court recently had occasion to revisit an aspect of the problem presented in *J.I. Case*. In *Belknap v. Hale*, 463 U.S. 491 (1983), the question was whether replacement employees hired during a strike but discharged when the strike was settled could sue the employer for breach of contract in state court on the ground that they had been promised permanent employment when hired. The Court in *Belknap* acknowledged that under *J.I. Case*, these individual contracts could not in all probability be specifically enforced to the detriment of the other organized employees, but the Court regarded as a separate question, and one not determined by *J.I. Case*, whether an action for damages by the replacements would lie for breach of the individual contracts. 463 U.S. at 506 (quoting the language from the order in *J.I. Case* also quoted above.)

The upshot is that while there is an open national labor policy question of major importance regarding the viability of advantageous individual employment contracts entered into while the individuals are outside any organized bargaining unit, that question is, in a case like this, under the express direction of *J.I. Case*, properly raised as a *defense* by the employer to a suit under the asserted individual contract. If, as petitioners argue,

the rule turns out to be that there is in fact an inflexible NLRA rule against the coexistence of collective bargaining agreements and advantageous individual contracts (absent, of course, some express permission for such contracts in the collective agreement, *see* pp. 21-22, n.15, *supra*), and that any individual agreement is therefore void for all purposes, including a suit for damages for its violation, then respondents will not recover from petitioners in this case. But any such rule would not convert respondents' state cause of action on their individual contracts into a federal cause of action under § 301. For the substantive rule eradicating the state cause of action, *like any other federal labor law preemption defense*, would derive from the NLRA's provisions regulating the collective bargaining system, and not from the collective agreement itself or from § 301.

This analysis does not change with the argument that the true effect of *J.I. Case* is to merge or subsume any individual employment contract into the collective bargaining agreement, rather than to eradicate the individual contract entirely, and that respondents were therefore obliged to bring a grievance under the collective agreement here to test that proposition. Once again, this argument is *defensive*: petitioners' contention in this regard is in effect that respondents brought the wrong lawsuit and that if respondents had proceeded in a different manner, they might have prevailed.[20]

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[20] The situation is analogous, in other words, to one in which the defense is that a suit brought as a contract action had to have been brought as a negligence suit or not at all, because there was in fact no valid contract between the plaintiff and the defendant. If that defense prevailed, the plaintiff might have the opportunity to replead the case by making the allegations necessary to establish negligence. The plaintiff, however, may choose not to exercise that option, perhaps believing that there was in fact no negligence, or that the tort statute of limitations had run although the contract statute had not. Absent the exercise of an opportunity given to the plaintiff to replead, the suit would not become one in negligence of its own force. Because the complaint as actually pleaded did not

Similarly, if the substantive federal labor law rule is that only individual employment contracts that are inconsistent with the collective bargaining agreement are nullified by the collective agreement, the same jurisdictional result obtains. If that proved to be the proper answer to the *J.I. Case* question, then it might well be that in many, or even most, instances, the viability of a state law contract action would turn upon federal law. But it is well settled that it is not sufficient to establish removal jurisdiction that as a practical matter "the *only* question for decision is raised by a federal pre-emption defense." *Franchise Tax Board*, 463 U.S. at 13. Since this federal question would not arise as an element of the state cause of action, as defined by the state (*see* pp. 9-13, *supra*) the federal issue is once again a matter of defense and not a necessary part of plaintiff's cause of action.

The other possible source of a rule voiding the pre-existing advantageous individual employment contracts of employees who later enter an organized bargaining unit would be the subsequently-negotiated collective bargaining agreement itself. The argument would be that the later-negotiated collective agreement here waived any pre-existing individual contract rights respondents had, so that a demonstration that the individual contract survives the collective agreement is a necessary part of respondents' cause of action. But any such waiver contention is, again, clearly a matter of defense, as it would be if based upon a subsequently negotiated individual agreement. *See* Fed. R. Civ. Pro. Rule 8 ("release" and "waiver" are "affirmative defenses" that must be specifically pleaded in an answer to a complaint). The issue of the two agreements' consistency is no more part of the plaintiff's case on this theory than it is on the assumption that federal labor policy, rather than the collective agreement itself, invalidates respondents' individual agreements. *See* pp. 23-24, *supra*.

---

state a viable cause of action, the plaintiff would simply lose, even if his judgment about the viability of the negligence action might have turned out, had the issue been actually litigated, to be incorrect.

In every instance, then, the preemption arguments upon which petitioners rely are based on the proposition that respondents can succeed in this case, if at all, only if respondents *fundamentally restructure their lawsuit* to rely upon a contract completely separate from the one they have chosen to sue upon. In this respect, the federal labor law arguments in this case differ fundamentally from those made in *Avco*, *supra*. In that case, the plaintiff's basic litigation decision to bring a suit alleging violation of the collective bargaining agreement was respected, and removal was based only upon the choice of law conclusion that the cause of action *as actually pleaded* was one arising under federal law. Thus, the preemption arguments in this case, unlike those in *Avco*, are inconsistent with the respect for the plaintiff's litigation choices inherent in the well-pleaded complaint rule.

When all is said and done, petitioners' position comes down to the assertion that federal labor policy requires suspension of the ordinary distinctions between federal issues raised in the well-pleaded complaint and federal issues that come into a case as defenses, and mandates that removal be permitted in the labor law context based on a wide variety of defensive preemption theories. It suffices, we believe to paraphrase this Court's rejection of a similar plea to tamper with the jurisdictional scheme Congress has established by divesting the state courts of jurisdiction over labor law issues that will ultimately be resolved, in any event, under federal law:

> It is implicit in the choice Congress made that "diversities and conflicts" may occur, no less among the courts of the eleven federal circuits, than among the courts of the several states, as there evolves in this field of labor management relations [a] body of federal . . . law . . . . But this not necessarily unhealthy prospect is no more than the consequence of

> the historic acceptance of [state jurisdiction over cases involving federal law defenses.] To resolve and accomodate such diversities and conflicts is one of the traditional functions of this Court. [*Charles Dowd Box v. Courtney, supra*, 368 U.S. at 514.]

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

AMICUS CURIAE

BRIEF

No. 86-526

(13)

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

CATERPILLAR, INC., ROBERT GILMORE,
DON FOWLER, JEFFREY GLICKMAN,
A. E. MATHISEN, KEITH WHEELER
Petitioners,

VS.

CECIL WILLIAMS, CLYDE WARD,
FREDERICK WALKER, ROBERT A. VAN BUREN,
CLARK A. TORRES, JOHN TENNANT,
JAMES PAYTON, CLARENCE NORTHERN,
JAMES MORETTI, RICHARD KANUSE,
ANDREW HORVATH, LEE GREEN,
RICHARD L. GONZALES, WILLIE CRUM,
PETE CARNUTE and JOEL BRYAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE EMPLOYMENT LAW CENTER OF THE SAN FRANCISCO LEGAL AID SOCIETY AS AMICUS CURIAE

JOAN M. GRAFF
ROBERT BARNES
JOHN M. TRUE
COUNSEL OF RECORD
RINA HIRAI
The Employment Law Center
of the San Francisco
Legal Aid Society
1663 Mission Street,
Suite 400
San Francisco, CA 94103
(415) 864-8848

39 pp

QUESTION PRESENTED

Whether employees injured as a result of an employer's breach of individual promises made to them during time periods when they were in supervisory or other non-collective bargaining unit positions may sue on said promises in the appropriate state court when enforcement of the individual agreements can have no effect whatsoever on the interpretation or administration of the collective bargaining agreement to which the employer is a party.

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In The

Supreme Court Of The United States

October Term, 1986

CATERPILLAR, INC., ROBERT GILMORE, DON FOWLER, JEFFREY GLICKMAN, A. E. MATHISEN, KEITH WHEELER
Petitioners,

v.

CECIL WILLIAMS, CLYDE WARD, FREDERICK WALKER, ROBERT A. VAN BUREN, CLARK A. TORRES, JOHN TENNANT, JAMES PAYTON, CLARENCE NORTHERN, JAMES MORETTI, RICHARD KANUSE, ANDREW HORVATH, LEE GREEN, RICHARD L. GONZALES, WILLIE CRUM, PETE CARNUTE AND JOEL BRYAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EMPLOYMENT LAW CENTER OF THE SAN FRANCISCO LEGAL AID SOCIETY AS *AMICUS CURIAE*

INTEREST OF *AMICUS*

With the consent of the parties[1] the Employment Law Center of the San Francisco Legal Aid Society ("Center") respectfully submits this brief *amicus curiae* in support of respondents. The Center is the principal project of the Legal Aid Society of San Francisco. The Legal Aid Society and the Center share a long

[1] The consent letters of both counsel have been filed with the Clerk of the Court.

tradition of providing legal representation to the poor. The Society was founded in 1916 to provide counsel to those unable to afford it. Since then it has been firmly committed to representing the underrepresented.

The Center has litigated in the employment law field for over a decade. It focuses on legal problems which affect disadvantaged people as they seek employment, and it represents those who find employment opportunities denied them for reasons other than their ability to do the job.

One of the major initiatives of the Center over the past five years has been enlarging the rights of unorganized workers, including those laid off as a result of management decisions to move jobs overseas, to discontinue certain types of work, and to shift work away from inner-city locations where jobs are desperately needed.

As part of this initiative the Center brought the case of *Carson v. Atari*, Santa Clara County Superior Court No. 530743, filed August 15, 1983, a class action lawsuit on behalf of over 500 workers who were permanently laid off without even one hour's notice. The case sought to establish state law principles entitling workers to notice in the face of layoffs and plant closings. The issue of federal preemption of such rights was vigorously litigated, but the case was settled favorably close to trial.

The Center also is currently litigating another class action case which has similar issues. In *Canche v. Koyama Farms*, San Luis Obispo County Superior Court No. 62058, filed September 29, 1986, labor preemption also plays an important role. In this case the defendant employer, Koyama Farms, made promises to farmworker employees over a period of fifteen years or more that they would have job security and would not be terminated without notice. In 1982, however, Koyama Farms signed a collective bargaining agreement with a small farmworker union which represented Koyama workers until 1985 when the union went out of business. Shortly thereafter, Koyama Farms terminated all its employees without notice. The employees have sued, *inter alia*, for breach of the individual employment contracts made prior to

the Union agreement. The outcome of the case at bar will likely be determinative of the rights of the Koyama Farms field workers.

The Center has filed submissions as a friend of this Court on numerous occasions. We filed an *amicus curiae* brief recently in *Fort Halifax Packing Company, Inc. v. P. Daniel Coyne, Director, Bureau of Labor Standards, Maine Department of Labor*, No. 86-341, now pending before this Court, in which the issue is whether a State of Maine statute extending certain protections to workers displaced by plant closures is preempted by federal law.

In the area of sex discrimination, we have filed briefs in *California Federal Savings and Loan Association v. Guerra*, __U.S. __, 55 U.S.L.W. 4077 (Jan. 13, 1987), in which this Court held that state pregnancy disability law was not preempted by the Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(k), *Wygant v. Jackson Board of Education*, _ U.S._, 106 S.Ct. 3320 (1986), *Meritor Savings Bank, FSB v. Vinson*, _ U.S._, 106 S.Ct. 780 (1986), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, No. 86-421, now pending before the Court.

In the area of discrimination on the basis of physical handicap, the Center has filed several *amicus* briefs, most recently in *Atascadero State Hospital v. Scanlon*, _ U.S. __, 105 S.Ct. 3142 (1985), *reh'g denied*, 106 S.Ct. 18 (1985), and *School Board of Nassau County v. Arline*, No. 85-1277, now pending before the Court.

Because of our long-standing interest in the rights of unorganized workers, as well as our record in litigating in their behalf, the Center is uniquely able to present to the Court views on the issues in this case arising directly from the needs of such workers.

STATEMENT OF THE CASE

Respondents are 13 employees who were employed by petitioner Caterpillar Tractor Co., now known as Caterpillar, Inc. ("Caterpillar"), at its facility in San Leandro, California. (Cert. Pet. A-40 through A-42). At various times between 1962 and

1981 each of the employees was promoted or transferred from positions covered by Caterpillar's collective bargaining agreement with The International Association of Machinists, AFL-CIO, District Lodge No. 115, Local Lodge No. 284 ("the Union") to weekly salaried and management positions outside the collective bargaining unit. (Cert. Pet. A-97, A-98). Respondents worked in various positions outside the bargaining unit for periods of three to fifteen years before each was involuntarily downgraded to a position within the bargaining unit. Thereafter, all were terminated when the San Leandro plant was closed in 1985. *Id.*

While respondents worked in jobs outside the bargaining unit, Caterpillar, through its agents, promised to continue to employ them as long as their job performance was satisfactory. (Cert. Pet. A-43). More important, the employees were assured that even if the San Leandro facility were to close, Caterpillar would provide employment opportunities for them at other facilities or with related companies or subsidiaries of Caterpillar. (Cert. Pet. A-43, A-48). In reliance on these assurances the employees continued to perform services for Caterpillar. *Id.*

The individual employment contracts formed thereby did not contain any provisions relating to the collective bargaining agreement. Moreover, while respondents worked in positions outside the bargaining unit it was understood by all parties that no provision of the labor contract applied to them. In fact, the collective bargaining agreement is entirely devoid of any reference to wages, benefits, seniority or job security of any kind for any employees except "production and maintenance employees of the company," a category which applied to none of the respondents during the periods of time in question. (Cert.Pet. A-62).

After their terminations, respondents sought relief in state court for Caterpillar's breach of their individual employment contracts. Their lawsuit (Cert. Pet. A-38 through A-56) makes no allegation based on the collective bargaining agreement. Fairly read, the suit charges that Caterpillar reneged on its promises to the plaintiff-employees to provide them with transfers to other facilities rather than with layoff notices. Caterpillar removed the case to federal

court on the ground that the claims were preempted by Section 301(a) of the Labor Management Relations Act. ("LMRA"), 29 U.S.C. § 185(a). (Cert. Pet. A-22, A-36). The District Court then dismissed the action. (Cert. Pet. A-20, 21).

On appeal, the United States Court of Appeals for the Ninth Circuit held that because the complaint was based solely on the individual contracts of employment entered into between respondents and Caterpillar while respondents were in positions outside the bargaining unit, no federal cause of action was alleged. Thus removal of the action was improper. The District Court judgment was reversed, with instructions to remand to the state court. (Cert. Pet. A-1 through A- 19).

SUMMARY OF ARGUMENT

The Court is being asked by this petition to depart from long-held principles of federalism so as to extend the jurisdiction of the federal courts into areas up to now exclusively regulated by state law. States have developed a wide variety of approaches to private-sector employment relationships between employers and non-union employees: some jurisdictions have been hospitable to "wrongful discharge" theories; others have been less so. Each state's jurisprudence has arisen from its particular needs and circumstances.

Although this diverse body of law has co-existed for decades in harmony with the federal "common law" of labor relations resulting from the passage of Section 301(a) of the LMRA, petitioners and their *amici* plainly seek to use dangerously overbroad notions of federal preemption to inhibit the development of these legal doctrines. They would have the Court invalidate actions by individual employees who seek to hold their employer accountable for promises made while those employees were in jobs wholly apart from any collective bargaining unit and not covered by any collectively bargained contract.

The Employment Law Center respectfully urges the Court to avoid such adventurism by finding that this case was improperly removed to federal court pursuant to the "well-pleaded complaint"

doctrine and the Court's holding in *Franchise Tax Board v. Construction Laborers' Vacation Trust*, 463 U.S. 491 (1983). Further, it is submitted that the arguments for federal preemption of plaintiffs' lawsuit do not survive a careful reading of *J.I. Case Company v. N.L.R.B.*, 321 U.S. 332 (1944) and *Belknap v. Hale*, 463 U.S. 491 (1983). Finally, we suggest that both federal labor policy and the sanctity of state judicial and legislative development of employment law principles will best be served by a holding that this dispute should be remanded to state court where it belongs.

ARGUMENT

I. INTRODUCTION

Forty three years ago this Court laid down a foundation stone of modern collective bargaining doctrine when it decided that an employer would not be allowed to use individual contracts of employment it had entered into with its employees to defeat the purposes of the the National Labor Relations Act by refusing to bargain in good faith with the union which had been designated by its employees as their representative for purposes of collective bargaining. *J.I. Case Company v. N.L.R.B., supra*, 321 U.S. 332.

Today the Court is faced with the reverse problem. An employer that has made otherwise actionable promises to certain of its employees seeks to avoid responsibility for these undertakings by asserting as a bar its collective bargaining agreement with a union representing other employees. It is respectfully submitted, and will be argued in more detail below, that although federal labor preemption is a fundamental part of American industrial policy, it was never meant to be taken as far as petitioners now propose.

We write to urge the Court that proper respect for the developing body of state law governing the rights of the 80% of the American workforce not represented by unions ("unorganized workers") requires that the judgment below in this case be sustained. First, we will argue in support of respondents' position

that the instant lawsuit was improperly removed. (Part II, *infra*, pp.7-10). Next we will describe some of the legal doctrines which have arisen to protect the rights of unorganized workers. (Part III, *infra*, pp. 10-18). Finally, we will address ourselves briefly to the merits of using federal labor preemption to extinguish these claims and argue that no valid policy purposes are served thereby. (Parts IV and V, *infra*, pp. 18-29)

II. SINCE THE COMPLAINT HEREIN DOES NOT STATE A CLAIM "ARISING UNDER" FEDERAL LAW, THE DISTRICT COURT LACKED JURISDICTION TO REMOVE THE CAUSE FROM STATE COURT

The dispute as to whether this case is preempted by federal law rests on rather peculiar facts which cannot be considered likely to be repeated often.[2] Employees once in a bargaining unit, then promoted out, then sent back in, dispute their employer's refusal to make good on promises made while they were out of the unit. No one[3] seriously argues that the possibility of federal preemption would arise if the employees had never been represented by the Union. It is only the circumstance that they were covered by the collective bargaining agreement at various times before and after the disputed promises were made that gives rise to the preemption issue.

Since the assertions made by petitioners that these claims are preempted is so palpably an affirmative defense, we strongly support respondents' arguments (*See*, Brief in Opp. to Cert. Pet., pp.3-

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[2] Because of the somewhat unusual fact pattern presented here, the Court may dismiss the petition as improvidently granted if it concludes that resolving the legal issues presented by the petition will turn solely on the construction of particular contract provisions or surrounding facts. "We do not grant a *certiorari* to review evidence and discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925)

[3] Except, as noted *infra*, at p. 17, for the U.S.Chamber of Commerce, one of petitioners' *amici*. *See*, Brief of The U.S. Chamber of Commerce as *Amicus Curiae* at pp. 18,19)

6) that the Court may dispose of this matter simply by concluding that no federal jurisdiction existed under the removal statute.

A federal court must possess original jurisdiction over a dispute before a lawsuit filed in state court may be removed. 28 U.S.C. §1441(a). In non-diversity cases federal jurisdiction depends on whether the controversy "aris[es] under the Constitution, treaties or laws of the United States." 28 U.S.C. §1441(b).

A case does not arise under federal law unless the federal question appears on the face of the plaintiff's complaint. *Gully v. First National Bank*, 299 U.S. 109 (1936). "[T]he plaintiff is the absolute master of what jurisdiction he will appeal to." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, __ U.S. __, 106 S.Ct. 3229, 3233, n.6 (1986) citing *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915). What has come to be known as the "well-pleaded complaint" rule establishes that "jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow, supra*, 106 S.Ct. at p. 3233, n.6.

The only exception to the well-pleaded complaint rule arises when a plaintiff attempts to defeat federal jurisdiction by "artful pleading;" that is, by avoiding claims which, on the basis of prior controlling precedent, are obviously federal claims. *Great Northern Ry. v. Alexander*, 246 U.S. 276, 281, 282 (1918); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968). In *Avco* an employer's state law contract claims against a union were removed to federal court because prior Supreme Court decisions had definitively settled that Section 301 of the LMRA preempted an action to enforce a "no-strike" clause in a collective bargaining agreement. *Id.* at 559, 560.

Federal courts may properly scrutinize the allegations in the complaint to determine whether the plaintiff's reliance on state law is, in fact, well-pleaded. They must do so with "due regard for the rightful independence of state governments, . . . [and] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941), quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

In the instant case, the complaint relates solely to contracts entered into between the employer and employees before the employees were covered by the collective bargaining agreement. Resolution of issues regarding the existence or breach of these contracts does not require examination of the bargaining agreement, inasmuch as the bargaining agreement is not an element of the respondents' claims. Consequently, Section 301 of the LMRA does not provide a cause of action and, therefore, no substantial question of federal law requires resolution.

Under the well-pleaded complaint rule, it is "settled law that a case may not be removed to federal court on the basis of a federal defense, *including the defense of preemption*, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Board v. Construction Laborers Vacation Trust, supra*, 463 U.S. at p. 14 (emphasis supplied). Petitioners' claim of preemption amounts to nothing more than the defensive allegation that the plaintiffs' lawsuit can be defeated by the operation of federal law. While we vigorously dispute this argument, (*See*, Part IV, *infra*, pp. 18-24), we must also observe that the Court need not even reach it, since respondents' claims do not "necessarily" arise under federal law. *See, Avco Corp. v. Aero Lodge, supra*, 390 U.S. at p. 560. Not every lawsuit arising anywhere in the general vicinity of a collective bargaining agreement is removable. As the Seventh Circuit Court of Appeals observed:

> There is no indication that Congress intended by the removal mechanism to cause in the allocation of judicial business between state and federal courts the wholesale stampede of cases into the federal district courts.

Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976)

The Ninth Circuit thus correctly concluded that this case should not have been removed because it could not have been brought in federal court originally. The court properly characterized petitioners' allegation of federal preemption as an affirmative

defense, which does not provide a basis for removal; its judgment should be affirmed.

III. THIS COURT SHOULD DECLINE PETITIONERS' INVITATION TO EXTEND THE REACH OF FEDERAL JURISDICTION INTO AREAS CLEARLY RESERVED TO THE STATES

Sound principles of federalism require that the doctrine of labor preemption not permit federal courts to sweep into their jurisdiction disputes which are legitimately cognizable under state law. Although it is now well settled that the law of collective bargaining is federal law, *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), there have been significant developments in the area of the rights of unorganized workers during the years since *J.I. Case* was decided. As petitioners themselves note, "a new body of state law has developed which has greatly expanded the remedies available to employees claiming unjust discharge." (Cert. Pet. p. 6) [4]

The process by which state courts have addressed themselves to these employment questions has been just as important as the results. Thus, just as the doctrine of strict liability in tort developed through cases beginning with *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) and culminating with *Greenman v. Yuba Power Products*, 59 Cal.2d 57, 377 P.2d 897 (1963), so doctrines of employment law as between employers and unorganized workers have begun to develop. *See, e.g., Petermann v. Teamsters Local 396*, 174 Cal.App.2d 184, 344 P.2d 25 (1959) ("Wrongful discharge" found where employee refused to commit perjury on behalf of employer); *Rabago-Alvarez v. Dart Industries*, 55 Cal.App.3d 91, 127 Cal. Rptr. 222

[4] A number of commentators have observed that the expansion of employee rights decried by petitioners is long overdue. *See*, Peck, *Unjust Discharges From Employment: A Necessary Change In The Law*, 40 Ohio St. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 Va. L. Rev. 481 (1976); Blades, *Employment At Will v. Individual Freedom: On Limiting The Abusive Exercise Of Employer Power*, 67 Colum. L. Rev. 1404 (1967).

(1976) (female employee unlawfully terminated for refusing to accompany male clients to topless and bottomless entertainment); *Cleary v. American Airlines*, 111 Cal.App.3d 443, 168 Cal. Rptr. 722 (1980) (Wrongful discharge occured when employee refused to illegally oppose union organizing activities); *Tameny v. Atlantic Richfield Oil Co.*, 27 Cal.3d 167, 612 P.2d 1330, 164 Cal.Rptr. 839 (1980) (Discharge for refusal to participate in illegal gas price-fixing scheme unlawful); *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal. Rptr. 917 (1981) (Discharge of long term employee requires legitimate reason); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980) (Good cause required for termination of indefinite term contract); *Monge v. Beebe Rubber*, 114 N.H. 130, 316 A.2d 549 (1974) (Wrongful discharge found where female fired for refusing supervisor's sexual advances).

Not all states have been quick to expand the rights of employees. Indeed, in many jurisdictions termination of employment "at will" is still the rule. *See*, Cathcart and Dichter, (Eds.) *Employment At Will: A 1985 State-By-State Survey*, (1985)[5] It is safe to observe that each state has taken an approach to employment problems that is at least somewhat distinct from those taken by the others.

Limitations on the rights of employers to discharge employees at will have developed in at least four related areas; (1) statutory,

[5] Thus, for instance, in Alabama an employer may discharge an employee for cause, no cause or bad cause. *Hinrichs v. Tranquilaire Hospital*, 352 So.2d 1130, 1131 (Ala. 1977)

Elsewhere, the New York Court of Appeals has recently clarified that state's employment doctrine in two cases, *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982) and *Murphy v. American Home Products Corporation*. 58 N.Y.2d 293, 448 N.E.2d 86 (1983). Although in the first case a judicial exception to employment at will was created when an employer's personnel handbook was found to impose an obligation to terminate only for cause, the court in *Murphy* announced that further erosion of the at-will doctrine would have to await action by the New York legislature.

The summary of the legal doctrines covering employer-employee relations in each state and in the District of Columbia in *Employment-At-Will: A 1985 Survey, supra*, is the most accurate indication available of the diversity of the legal approaches to employment.

(2) "public policy," (3) tort, and (4) contract. Each of these areas is threatened by the expansive reading of federal labor preemption urged by petitioners. We will briefly discuss each below.

A. Protective Legislation [6]

It almost goes without saying that employer-employee rights have been the subject of a great deal of state legislative activity. Pursuant to their police powers, states have been legislating for decades in the area of workers' compensation for industrial injuries, minimum wage, and employment discrimination, as well as in a host of other areas too numerous to mention. In each area, of course, the legislation constitutes an expression of the strong concern states have evinced for regulating the workplace.[7]

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[6] Although we have used the term "protective legislation," it should be pointed out that some states have passed laws "protective" of *employers'* interests as well. *See, Employment-At-Will: A 1985 Survey, supra,* and Cal. Labor Code § 2922 (Deering, 1976 and 1987 Supp.), which states:

> An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.

As a number of commentators have observed, the "at will" doctrine was incorporated into American law under circumstances which cast considerable doubt at least on its historical validity. *See, eg,* Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute, supra,* 62 Va. L. Rev. 481, 485; Blumrosen, *Employer Discipline: U.S. Report,* 18 Rutgers L. Rev. 428, 432, 433 (1964).

[7] *See, e.g.,* the preamble to California's Fair Employment and Housing Act, Cal. Gov't. Code § 12920, which states in pertinent part:

> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.
>
> Further, the practice of discrimination because of race, color, religion, sex, marital status, national origin, or ancestry in housing accommodations is declared to be against public policy.
>
> It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices.
>
> This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

As a result of this activity, discharges are now far more subject to statutory control than they were at the time *J.I. Case* was decided. *Cleary v. American Airlines, supra,* 111 Cal.App. 3d 443, 450-451, 168 Cal. Rptr. 722 contains a brief summary of one state's legislative activity. In addition to prohibitions against employment discrimination, many statutes protective of workers' rights on the job contain anti-retaliation provisions. Thus, it is illegal to terminate the employment of or otherwise retaliate against an individual who makes a claim for workers' compensation, Cal. Labor Code § 132(a) (Deering, 1976 and 1987 Supp.) against someone who reports a health or safety violation, Cal. Labor Code 6310, 6311 (Deering 1976 and 1987 Supp.); *Hentzel v. Singer,* 138 Cal.App.3d 29, 188 Cal. Rptr. 159 (1982) or against an employee who reports wage and hour violations. Cal. Labor Code § 98.7 (Deering 1976 and 1987 Supp.)

B. Terminations In Violation Of "Public Policy"

Second, and in many ways related, some state courts have begun to determine that discharges in violation of a "public policy" articulated in some manner by the state can be actionable. Thus, discharge for refusing to commit an unlawful act, *Petermann v. Teamsters Local 396, supra,* 174 Cal.App. 2d 184, 344 P.2d 25, for performing a public obligation such as jury duty, *Nees v. Hocks,* 272 Ore. 210, 536 P.2d 512 (1975), and for supplying information in connection with a police investigation, *Palmateer v. International Harvester Co.,* 85 Ill.2d 124, 421 N.E.2d 876 (1981) are all examples of terminations found to have violated state public policies.[8] In this area as well as where the legislature has acted, an intense and obvious local concern on the part of the state in vindicating its public policy clearly can be seen.[9]

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[8] *But see, e.g., Murphy v. American Home Products Corporation, supra, n. 3,* 58 N.Y. 2d 293, for a contrary development.

[9] This concern has been given proper deference by Federal courts. *See, Garibaldi v. Lucky Food Stores, Inc.,* 726 F.2d 1367 (9th Cir. 1984) *cert. denied* _ U.S. _, 105 S.Ct. 2319 (1985)

C. Tortious Discharges

Third, state courts have found that employers have committed torts when discharging employees. As noted above, discharges in violation of "public policy" are considered to be torts. *Cleary v. American Airlines, supra,* 111 Cal.App.3d 443, 456. In addition to the "tort" of violating public policy, however, a number of other employment torts have been created. Thus, in *Monge v. Beebe Rubber Co., supra,* 114 N.H. 130, 316 A.2d 549, the New Hampshire court fashioned the tort of "abusive discharge" so as to provide a remedy to a woman who had refused the advances of a supervisor and had been fired as a result. *See also, Tameny v. Atlantic Richfield, supra,* 27 Cal.3d 167, 164 Cal. Rptr. 839; *Alcorn v. Anbro Engineering, Inc.,* 2 Cal.3d 493, 468 P.2d 216 (1970); *Agis v. Howard Johnson Co.,* 371 Mass. 140, 355 N.E.2d 315 (1976); *Agarwal v. Johnson,* 25 Cal.3d 932, 603 P.2d 58 (1979).

One of the most controversial employment torts to arise in the state courts is that based on the breach of the covenant of good faith and fair dealing implied in contracts of employment. *See, e.g., Pugh v. See's Candies, supra,* 116 Cal.App.3d 311,171 Cal. Rptr. 917 ; *Rulon-Miller v. International Business Machines Corp.* 162 Cal.App.3d 241, 208 Cal Rptr. 524 (1984). Although the covenant is considered to be an implicit provision of the employment agreement, violation of it "sounds in tort," *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.,* 36 Cal.3d 752, 686 P.2d 1158, 206 Cal Rptr. 354 (1984) giving rise to damages well in excess of contract damages for plaintiffs who can avail themselves of this doctrine.

In *DeTomaso v. Pan American World Airways, Inc.,* 174 Cal.App.3d 1023, (1985), *review granted* 224 Cal.Rptr.100, 714 P.2d 1239, (1986), the California Supreme Court will shortly hear argument on an employee's allegations that his employer committed the torts of defamation, and intentional infliction of emotional distress, as well as breach of warranty to certain property he had purchased from his employer. The state court's resolution of whether the Railway Labor Act, ("RLA") 45 U.S.C. §151 *et seq.* preempts the employee's action, a question closely parallel to that

at bar, will provide important guidance to California employers and employees.

Important local concerns are naturally expressed when courts define tortious conduct. In this area too, those concerns have been squarely recognized by federal courts. Thus, in *Farmer v. United Brotherhood of Carpenters and Joiners,* 430 U.S. 290 (1977) this Court upheld a work-related claim based on the tort of intentional infliction of emotional distress, against the defense of federal labor preemption noting that:

> The State . . . has a substantial interest in protecting its citizens from the kind of abuse of which . . . [plaintiff] . . . complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell [Automobile Workers v. Russell,* 356 U.S. 634 (1958)], or in damage to reputation, as in *Linn [v. Plant Guard Workers,* 383 U.S. 53 (1966)]. Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law . . ., our decisions permitting state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens.

Farmer v. Carpenters, 430 U.S. at pp. 302, 303.

D. Breach Of Contract

The fourth area in which states have developed the law affecting the respective rights of employers and employees has to do with the contractual relationships between them. Theories of implied-in-law or implied-in-fact contract have been used under various circumstances to protect employees from sudden, arbitrary discharge, *Pugh v. See's Candies, supra* 116 Cal.App.3d 311, 171 Cal. Rptr. 917 to require "just cause" where that concept is to be found in an employer's written personnel policies, *Toussaint v. Blue-Cross Blue Shield of Michigan, supra,* 408 Mich. 579, 292

N.W. 2d 880, or even to require a fair, accurate and impartial evaluation of an employee's work performance. *Chamberlin v. Bissell, Inc.*, 547 F.Supp. 1067 (W.D. Mich. 1982).

In this final area of the developing body of judicially articulated state "wrongful discharge" law, federal deference to state interests in regulating the conduct and contractual relations of employees and employers is equally clear and long-standing. *See, e.g., Jones v. General Tire & Rubber Co., supra,* 541 F.2d 660; *Medlin v. Boeing Vertol Co.*, 620 F.2d 957 (3d Cir. 1980); *Cancellier v. Federated Department Stores*, 672 F.2d 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982); *Scott v. New United Motor Mfg. Inc.*, 632 F.Supp. 891, (N.D.Cal 1986) and *Anderson v. Ford Motor Co.*:

> [I]f state law purports to define the meaning of the contract relationship under a collective bargaining agreement, state law will be preempted in deference to § 301. Conversely, however, *state rules that proscribe conduct or establish rights and obligations independent of a labor contract are outside the preemptive scope of § 301.*

803 F.2d 953, 956 (8th Cir. 1986) (emphasis supplied)

However, in spite of the clarity with which the courts, including this Court, have expressed themselves, it is this area which is most directly implicated by the dispute at bar. Petitioners and their *amici* make no secret of their interest in seeing this Court use this case as an excuse to pull most, if not all, of the categories of legislated and judicially created employment wrongs into the "federal common law" of labor relations. They suggest, in fact, that the preemptive effect of the NLRA's Section 301 on "independent, non-negotiable, state imposed duties" was not resolved in this Court's recent decision in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), and that this issue has been deferred to be "fleshed out on a case-by-case basis." *See*, Pet. Brief at p. 31, fn. 20. Moreover, one of petitioner's *amici* devotes an entire section of its submission to the notion that federal law should entirely displace state regulation of employment contracts even where such contracts are not collectively bargained. *See*, Brief of The Chamber of Commerce of the United States as *Amicus Curiae* at pp. 18, 19. We respectfully urge that these proposals are irresponsible and ill-founded inasmuch as they wholly ignore the important state interests discussed above. The fact remains that employment disputes are not merely private controversies. As one commentator has recently observed:

> Some types of wrongful discharge actions are devices by which state policies unrelated to employment may be furthered by private litigation (footnote omitted). The case which created the tort of wrongful discharge in California, for example, involved an employee who refused to fix gasoline prices, which would have been a criminal act under state trade regulation laws. (footnote omitted) In such cases the discharge action is an enforcement device which is more appropriately characterized as part of the trade regulation or other substantive area of law than as part of the state's law of employment relations.

Comment: *N.L.R.A. Preemption of State Wrongful Discharge Claims*, 34 Hastings L.J. 635, 639 (1983).

The existence of a "federal common law" of collective bargaining neither suggests nor requires that *any* employment agreement be governed by federal law. As noted above, states generally have the authority under their police powers to order the relations between the employers and employees within their jurisdiction. *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

Absent a Congressional decision to exercise its power under the supremacy clause of the Constitution and enact legislation specifically seeking to regulate the areas described above, there is no reason for federal authority to intrude itself into them. As this Court has observed, in labor preemption cases "the purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *See also, New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 527 (1979); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180,187 (1978).

There simply is no indication that Congress has ever considered enacting legislation to regulate the contractual relationships between employers and employees.[10] In the absence of such legislation the Court should refrain from the judicial activism urged on it by petitioners and their *amici*.

IV. THE EMPLOYMENT CONTRACTS AT ISSUE IN THIS CASE LIE WELL BEYOND THE REACH OF SECTION 301 PREEMPTION

Although, as we have indicated, the Court need not reach the actual question of whether plaintiffs' claims are preempted, we wish to address briefly the issue of federal labor preemption on the merits, since important issues affecting employee rights are raised by the arguments made on behalf of petitioners. As petitioners concede, federal jurisdiction exists only in those cases "in which a well-pleaded complaint establishes *either* that federal law *creates* the cause of action *or* that the plaintiff's right to relief *necessarily* depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Laborers Vacation Trust, supra,* 463 U.S. at p. 27-28 (emphasis supplied). This case satisfies neither of the requirements set out above.

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[10] Nor is federal legislation likely to be passed any time soon. As Professor Peck has observed:

> Usually, statutes are not enacted because they incorporate good ideas or principles; rather, they are enacted because organized interest groups lobby for their enactment. Employees who have not been organized by a labor union are exactly like that: unorganized and therefore lacking in the unity of purpose and effort that produces a successful lobby. On the other hand, employers have associations that traditionally have lobbied against legislation conflicting with employer interests, and they may be counted upon to oppose legislation that would curtail the present power of employers to terminate employment without proof of cause. Nor can labor unions be expected to lobby for the enactment of a statute to limit that power of employers. The argument that a union will prevent unfairness by establishing a grievance procedure is one of the most persuasive arguments used to acquire members and organize a work force. Unions are not likely to work for adoption of a statute that would eliminate or greatly reduce the potency of such an argument.

Peck, *Unjust Discharges From Employment: A Necessary Change In The Law, supra,* 40 Ohio State L.J. at p. 3.

A. Plaintiffs' Claims Are Not "Created By" Federal Law

To claim that federal law *creates* the causes of action in the complaint herein is plainly absurd. The complaint sets out in explicit detail the factual predicate upon which the cause of action for breach of contract is based. (Complaint, Paragraph 27(A)-(G) set out at Cert. Pet. A-42 through A-48.) It states, in essence, that certain promises were made to the plaintiff-employees during the period of time they were employed by the employer but were not in the bargaining unit covered by the labor agreement. The complaint states clearly that these promises were made individually and unilaterally by the employer to each employee at various times. *Id.* It further states clearly that each employee individually relied upon these promises in conducting him or herself after they were made. (*See*, Complaint, Paragraph 27(G) at Cert. Pet. A-48.)

The collective bargaining agreement and its various addenda are also before the Court. (Cert. Pet. A-57 through A-92.) Examination of these documents reveals no provision which could provide the basis for any of the plaintiffs to assert a breach of the agreement based on the facts alleged in the complaint. The agreement simply did not apply to them while they were out of the unit.

Nor could they have proceeded under the grievance/arbitration procedure set out under the contract. (*See*, Cert. Pet. A-65 through A-74). To do so would have required the filing of a "grievance," which is defined in the agreement as:

> a. Any matter involving wages (except general wage adjustments), hours of work, or working conditions covered by the Agreement, or
> b. Any matter involving the application or interpretation of any provisions of this Agreement.

(Agreement, Article 10.1 at Cert. Pet. A-65)

Since plaintiffs were not covered by the provisions of the agreement, a grievance filed by them over alleged violations of those provisions would have been nugatory. Had a grievance been filed,

it undoubtedly would have been denied by the employer. Had such a grievance somehow been presented to an arbitrator, it undoubtedly would have been found to be beyond the arbitrator's limited authority. This Court has noted that labor arbitrators are authorized only to decide issues arising from the agreements that give them their power:

> [T]he arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)[11]

It is thus clear that the employer, the Union, and the employees all assumed that the collective bargaining agreement had no relevance whatever to the promises made to plaintiffs.[12]

B. Plaintiffs' Right To Relief Does Not "Depend On Resolution Of A Substantial Question Of Federal Law"

Fully realizing that no serious question exists that plaintiffs' claims were "created by" federal law, petitioners seek to bring

[11] This agreement, like many labor contracts, gives the arbitrator the "final and binding" authority to resolve disputes as to its meaning and application, but imposes a significant restriction inkeeping with the teachings of the *Enterprise Wheel & Car* case from the *Steelworkers' Trilogy* quoted from above. It states in Article 10.7 (Cert. Pet A-71):

> [H]owever, the Arbitrator shall have no power to change or detract from or add to the provisions of this Agreement, but shall have the power only to apply and interpret the provisions of this Agreement in reaching a decision.

[12] In case there were any doubt, representatives of that labor organization have filed uncontested declarations with the court below to the effect that the Union would not have been able to take the matter to arbitration. (These declarations are contained in the record before the Court of Appeals at CR 233-238, 268, 269).

them within the preemption doctrine by asserting that resolving them will somehow necessarily implicate federal law. Thus they argue that the individual agreements struck by plaintiffs with their employer merged with or were extinguished by the collective bargaining agreement at the time the plaintiffs returned to the unit. They were not.

1. An Employer May Maintain A Collective Bargaining Agreement With Some Employees And Individual Contracts With Others

Petitioners rely on *J.I. Case v. N.L.R.B., supra,* 32 U.S. 332 for the proposition that individual employment agreements can not co-exist with a collective bargaining agreement. There are several problems with this assertion. First, *J.I. Case* nowhere so states. Indeed, the Court's opinion only enjoins an employer from relying on individual contracts to avoid collective bargaining obligations. The Court read the N.L.R.B.'s cease and desist order to prevent the employer only from continuing to

> derive benefits from the contracts heretofore utilized and to forestall collective bargaining and deter self organization, and from entering into new contracts either for the purpose of again thus utilizing them or under circumstances in which similar infringement of the collective bargaining process would be a probable consequence.

J.I. Case v. N.L.R.B., supra, 321 U.S. at p. 340.

Thus, the Court in *J.I. Case* specifically contemplated that an employer *could* have a number of different contracts with different employees as long as none of them interfered with its obligation to bargain in good faith with any union representing any segment of its employees.[13] Since *J.I. Case* this Court has given force to con-

[13] Petitioners and their *amici* make much of the Court's observance that "the practice and philosophy of collective bargaining looks with suspicion on such individual advantages as individual employment contracts." (*Id.* at p. 358) In spite of that *dictum*, the Court nonetheless held open the possibility that such individual contracts could be countenanced. Moreover, as will be shown, *infra*, "suspicion" in this instance is unwarranted.

tracts made by a single employer at the same time as it has been signatory to a collective bargaining agreement *even when* each has considerable effect on the other. For instance, in *Belknap v. Hale,* 463 U.S. 491 (1983) the Court held an employer to its contractual obligations made to replacements hired for its striking workers, even though the employer asserted its collective bargaining agreement with the strikers as a bar.

In *Belknap* the Court found itself confronted with claims very much like those made by plaintiffs herein. In that case, as in this one, an employer benefitted from "solemn promises of permanent employment." 463 U.S. at p. 506.[14] The employer in *Belknap* also argued that the teachings of *J.I. Case* rendered the contracts it had made with the plaintiff not actionable. In disposing of that argument this Court simply quoted from *J.I. Case:*

> There, the cease-and-desist order, as modified, stated that discontinuance of the individual rights was *'without prejudice* to the assertion of any legal rights the employee may have acquired under such contract or to any defenses thereto by the employer.'

Belknap v. Hale, supra, 463 U.S. at p. 506, quoting *J.I. Case v. N.L.R.B., supra,* 321 U.S. at p. 342.[15]

The approach required by *Belknap* is entirely proper given the realities of modern day industry. Employers often are party to collective bargaining agreements as well as individual contracts which cover different groups of employees or even individual

[14] In *Belknap* the benefit to the employer was found in its ability to procure replacements for striking workers. Here, the employer benefits by obtaining experienced, reliable, non-bargaining unit workers who, having been employed in bargaining unit positions, bring greater knowledge of the employer's business and procedures to the jobs they hold.

[15] The Court also relied on *National Licorice v. N.L.R.B.,* 309 U.S. 350 (1940), a case predating *J.I. Case,* to point out that the replacement employees were entitled to take legal action in an appropriate forum to enforce their claims. "It [the NLRA] does not foreclose the employees from taking action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication." *Belknap v. Hale, supra,* 463 U.S. at p. 511, fn. 13, quoting *National Licorice v. N.L.R.B., supra,* 309 U.S. at p. 365.

employees. Typically, management employees are parties to personal service contracts with their employer. Other employees, as noted above, (*ante,* at pp. 15-18) may be parties to implied-in-fact or implied-in-law contracts. So, for instance, it is not uncommon for the clerical staff of a manufacturing facility to have an employment relationship with the employer entirely separate from those represented by the production workers union.

It cannot seriously be argued that the mere existence of a collective bargaining agreement with one group of employees pulls all other contracts settled on with other employees into its ambit like a powerful magnet. Yet this is precisely the thrust of petitioners' contentions.

2. An Employer May Maintain A Collective Bargaining Agreement Covering An Employee And At Another Time Make An Enforceable Contract With That Same Employee

Having established the common sense proposition that an employer can have both a collective bargaining agreement and individual contracts at the same time, let us turn to the question more squarely raised by this case: whether an employer can have an individual contract with an employee and at another time, enter into a separate and distinct contractual relationship with that same employee pursuant to a collective bargaining agreement.

Where, as here, the contracts were made at different times, concern different subject matter, and were intended to be performed at different times, we would suggest that the answer is clearly in the affirmative. The rule drawn from *National Licorice, J.I. Case, and Belknap* would make an "out of the unit" promise enforceable against an employer as long as there is no palpable, substantial interference with the rights and duties under the collective bargaining agreement.[16] Such a rule accomodates both the federal labor policy which animates collective bargaining and the rights of

[16] *See, also, Jones v. General Tire & Rubber Co., supra,* 541 F.2d 660; *Medlin v. Boeing Vertol Co., supra,* 620 F.2d 957, and *Anderson v. Ford Motor Co.,*

(footnote continued on next page)

states to ensure that employment agreements entered into within their jurisdictions are enforceable. Under it, only when it becomes clear that an employer seeks to avoid collective bargaining obligations by entering into individual employment contracts would the latter be preempted.

Here there is *no* interference with the collective bargaining agreement whatsoever, notwithstanding the arguments of petitioners and their *amici*. Plaintiffs simply claim that they have the right to rely on promises made to them at various times while they were not in the unit - promises that they would be transferred if and when the plant closed rather than be laid off. These promises were made to them before they went back into the unit and concerned action Caterpillar was to take after the collective bargaining agreement was over, *ie.* after the plant was closed.

Petitioners' metaphysical contentions as to "merger" aside, the nature of the undertakings made by the employer to plaintiffs in particular as distinct from those to the bargaining unit in general are sufficiently clear so that a bright line may be drawn between them and the employer held accountable for both. This is particularly so since there is no inconsistency between the two. We conclude by urging, therefore, that the promises made to plaintiffs should be enforceable in state court.

(footnote continued from previous page)
supra, 803 F.2d 953. In *Medlin* the Third Circuit Court of Appeals was faced with a situation very similar to this one. It concluded:

> [S]ection 301(a) provides jurisdiction only over suits for violation of contracts between an employer and a labor organization. In this case, the plaintiffs' claims are based only on the independent rights allegedly created by the letters of reinstatement . . . . Thus, these were not rights arising in any way under the collective bargaining agreement."

620 F.2d at p. 962. The court concluded that claims based on these letters were actionable.

V. CONTRARY TO THE ASSERTIONS OF PETITIONERS, FEDERAL LABOR POLICY WILL BE WELL SERVED BY UPHOLDING THE JUDGMENT OF THE COURT BELOW

Petitioners and their *amici* raise a host of dire consequences supposed to attend the affirmance of the Ninth Circuit's order remanding this matter to state court. Although it is beyond the intended scope of this brief to address each of the allegedly injurious consequences of affirmance perceived by petitioners' supporters, certain of the more plausible sounding ones will be addressed.

Plaintiffs do not contend, for instance, that they were to receive higher pay or better benefits. There is no showing that any of the bargaining unit's employees would have gotten anything less than he or she received under the labor contract and its various *addenda* if the disputed promises were enforced. Thus, there is simply no basis for the allegation that failure to preempt the plaintiff's claims herein would lead to unseemly or undue "competition" among union members. (*See*, Brief for the U.S. Chamber of Commerce as *Amicus Curiae* at p.8).

Next, besides attempting to stretch *J.I. Case* beyond recognition, petitioners also urge an expansive view of the nature of a collective bargaining agreement as a bar to plaintiffs' claims. A labor agreement, they say, is not a static document, but one subject to continual modification and change. Indeed, it is properly seen as a "generalized code" which governs the parties' future conduct. *United Steelworkers of America v. Warrior and Gulf Navigation*, 363 U.S. 574 (1960); (Pet. Brief at pp. 28, 29; Brief of U.S. Chamber of Commerce, p. 15). They even argue that a union, in its role as a representative of employees, wields "powers comparable to those possessed by a legislative body both to create and restrict the rights of those it represents." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944); (Brief of U.S. Chamber of Commerce, p. 10).

We would observe that, unlike petitioners' arguments based on *J.I. Case* commented on above, these assertions are accurate

characterizations of the nature of unions and collective bargaining; indeed, we fully agree with these views, but not with the conclusion drawn from them. The problem with these truisms as support for petitioners' arguments is that there is not a scintilla of evidence that the union ever undertook to represent plaintiffs as to the claims which form the basis of the complaint. Nor does it appear that the union *could* have done so. Nor does it even appear that an arbitrator would have or could have heard plaintiffs' claims in an arbitration under the collective bargaining agreement.

Thus, even granting the full measure of "legislative" power to the Union, there can be no argument based on this record that such power was ever exercised. To the contrary, as the declarations of the Union officers establish, it was specifically abjured. Similarly, even conceding that the collective bargaining agreement has effect somewhat beyond the four corners of the contract, it could not, under any set of circumstances, apply to plaintiffs' claims. Some of the plaintiffs were supervisory employees at the time the promises were made. The Union could not have represented them as to any grievance they might have tried to file as the result of the breach of the promises.[17]

Then, while hesitating to claim that the collective bargaining agreement is *directly* implicated in this dispute as was the labor contract in *Allis Chalmers v. Lueck, supra*, 471 U.S. 202,

[17] It is hornbook labor law that an employer need only recognize a labor organization as the representative of the employer's employees in a unit appropriate for bargaining. 29 U.S.C. § 159(a). Specifically excluded from such a unit are supervisors as defined in Section 2(11) of the NLRA. 29 U.S.C. § 152(11). Indeed, supervisory employees do not have any of the protections of the NLRA. 29 U.S.C. § 152(3). Petitioners' concerns that failure to preempt plaintiffs' claims might impair the exclusivity of union representation, therefore, (Pet. Brief at pp. 24-27) are completely unfounded. Similarly, their suggestions that plaintiffs' interests are protected by the operation of various statutory guarantees that internal union processes will be democratic and/or fair (Pet. Brief at p. 25, fn. 15) are irrelevant. Since the Union could not have taken any action to pursue plaintiffs' claims, there would be little point in using internal union complaint procedures to lodge protests of such inaction. Nor would a lawsuit against the Union for breach of the duty of fair representation under *Vaca v. Sipes*, 386 U.S. 171 (1967) and its progeny have availed plaintiffs, since the Union clearly owed them no such duty.

petitioners assert that the collective bargaining agreement is drawn into this case because reference to it would be necessary, if only to see if there was a conflict between its provisions and the promises made to plaintiffs. First, this assertion is so obviously a defensive allegation that it is not surprising that the Ninth Circuit declined to find this case subject to federal preemption. More substantively, the answer to it may be found in *Belknap v. Hale, supra*. 463 U.S. 491. There, as noted, the Court declined to preempt state law claims which were far more entangled with the collective bargaining agreement than these claims are. A similar result must follow here.

Unlike the lawsuit in *Lueck*, the dispute here may be resolved simply by reference to what was said and done during periods of time when plaintiffs were, by everyone's admission, beyond the scope of the bargaining agreement.

This same, simple fact disposes of petitioners' concern that sustaining the Court of Appeals in this case will have a devastating effect on "national labor policy favoring interpretive uniformity." (*See*, Pet. Brief at p. 37; Brief of the U.S. Chamber of Commerce at pp. 26-29.) We have already noted (*ante*, pp. 10-18) the profusion of state law legal theories which now attend the dealings between employers and their unorganized employees. Not surprisingly, we view those developments with considerably less abhorrence than does the Chamber of Commerce.[18] Regardless of our views, or the views of other *amici*, as to whether the emergence of "wrongful discharge" theories are good developments or bad ones, the fact remains the they have no impact on the collective bargaining agreement between Caterpillar and the Union. Far from arising in a "gap" in that agreement, which would properly "be left to be filled in [by the arbitrator] by reference to the practices of the particular industry or of the various shops covered by the agree-

[18] From our perspective, "state law actions have narrowed the traditional gulf in benefits and protections that has existed between unionized employees and employees working without the protection of a collective bargaining unit." *N.L.R.A. Preemption of State Wrongful Discharge Claims, supra*, 34 Hastings L. J. at p. 636.

ment," (*See*, Brief of the U.S. Chamber of Commerce at p. 28, quoting *Steelworkers v. Warrior & Gulf*, 363 U.S. at p. 580) this lawsuit arose in an area the agreement did not and could not cover.

That being the case, proper deference to the rights of the states to fashion remedies for the wrongs alleged — or to decline to do so — requires a decision by this Court *not* to further extend the reach of federal labor preemption. The day may come when Congress will choose to regulate to a greater extent than it already has the employment rights of unorganized employees, but until that occurs their fate is and must be in the hands of state courts of general jurisdiction.

VI. CONCLUSION

The judgment of the Court of Appeals should be sustained, this writ should be dismissed, and the instant lawsuit should be remanded to state court for further proceedings.

Dated: March 8, 1987

Respectfully submitted,

Joan M. Graff
Robert Barnes
John M. True
(Counsel of Record)
Rina Hirai
The Employment Law Center
of the San Francisco
Legal Aid Society
1663 Mission St., Suite 400
San Francisco, CA. 94103
(415) 864-8848

AMICUS CURIAE

BRIEF

(15)

No. 86-526

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In the Supreme Court

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United States

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BRIEF OF AMICI CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION AND CALIFORNIA EMPLOYMENT LAW COUNCIL, IN SUPPORT OF PETITIONERS

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
F. CURT KIRSCHNER, JR.
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Amici Curiae, Merchants and Manufacturers Association and California Employment Law Council

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No. 86-526

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BRIEF OF AMICI CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION AND CALIFORNIA EMPLOYMENT LAW COUNCIL, IN SUPPORT OF PETITIONERS

DESCRIPTION OF INTEREST OF AMICI CURIAE

Amicus curiae Merchants and Manufacturers Association ("the Association") is a non-profit California corporation. Its purpose is to augment the human resources management of member firms. Over 3,100 companies of varying sizes and industries are members of the Association. The members collectively employ over one million employees. Many of the Association's members are parties to collective bargaining agreements with labor unions.

Amicus curiae California Employment Law Council ("CELC") is a voluntary, non-profit organization comprised of more than 60 employer-members representing a broad segment of California's employer community. CELC members employ in excess of 400,000 California employees. CELC was formed for the general purpose of promoting the common interests of employers and the public in sound government policies, procedures and laws pertaining to employment practices. Many of CELC's members are parties to collective bargaining agreements.

The decision below is of particular concern to members of the Association and CELC. It threatens several important precepts of federal labor policy: in particular, the primacy of grievance and arbitration to settle disputes over the interpretation and application of collective bargaining agreements, and the importance of applying clear and uniform federal law to interpret and enforce those agreements.

The Association and CELC will be referred to collectively herein as amici curiae.

CONSENT OF PARTIES

Petitioners and Respondents have consented to the filing of this brief by amici curiae; correspondence indicating consent will be filed concurrently.

STATEMENT OF THE CASE

Amici curiae respectfully adopt the Statement of the Case set forth in the Petitioners' Opening Brief as well as Petitioners' description of the Opinions Below, Jurisdiction, Statutory Provisions and the Question Presented.

SUMMARY OF ARGUMENT

Removal jurisdiction over an action brought in state court is available if it appears that one of the purported state claims is " 'really' one of federal law" or if "some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) (hereinafter "*Franchise Tax Board*").

Respondents, whose terms and conditions of employment are governed by a collective bargaining agreement, dispute their discharge from bargaining unit positions as a result of a plant shutdown. This states a claim cognizable under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ("Section 301"), and the action was properly removed on this ground. The collective bargaining agreement, in effect long before and at the time of respondents' termination, included provisions which set forth grounds for discharge and the effects of plant shutdown. If respondents should not have been terminated because of the purported individual promises of "permanent employment," then their discharge violated the just cause provision of the collective bargaining agreement. That agreement sets forth grievance and arbitration as respondents' exclusive remedy for disputing discharge.

The Ninth Circuit ignored the substance of respondents' claims and erroneously concluded that purported individual promises of "permanent employment" were somehow extraneous to the collective bargaining agree-

ment. The decision below, which effectively excludes respondents' claims from the collectively bargained grievance remedy, ignores the terms of the collective bargaining agreement and undercuts long established precepts of federal labor law which mandate arbitration as the remedy of choice in labor disputes.

Alternatively, respondents' action was properly removed because a federal question is an essential element of the state law breach of contract claim. The collective bargaining agreement and its effect on the purported individual employment agreements must be addressed as part of respondents' prima facie case for breach of an implied-in-fact contract.

Finally, the Ninth Circuit's decision below is contrary to the congressional mandate that uniform and consistent federal law be applied to labor disputes. The decision invites bargaining unit employees to abandor the arbitral forum, which best serves this mandate. As a result, state courts will entertain numerous suits brought by bargaining unit employees seeking to evade the strictures of their collectively bargained agreement.

ARGUMENT

I

RESPONDENTS' CAUSE OF ACTION FOR BREACH OF CONTRACT[1] ARISES UNDER SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT.

The Ninth Circuit determined that because respondents' complaint purports to plead causes of action based

[1]Because only one cause of action need arise under federal law in order to support removal jurisdiction (28 U.S.C. § 1441(c)), and for the sake of simplicity, amici curiae will focus on respondents' claim for breach of contract. It is submitted that the same arguments presented in Part I apply with equal force to the claims for breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress and misrepresentation, all of which distill to a single claim for unjust dismissal. *See Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, ____U.S. ____, 106 S. Ct. 863 (1986); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

on state law, the "well-pleaded complaint rule" foreclosed removal. *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 937 (9th Cir.), *cert. granted*, ____ U.S. ____, 107 S. Ct. 455 (1986). It is well settled, however, that removal jurisdiction obtains where, as here, a plaintiff's ostensible state law claim is "'really' one of federal law." *Franchise Tax Board*, 463 U.S. at 13; *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557, 560 (1968).

A. Section 301 Governs Respondents' Breach of Contract Claim, Which Disputes the Propriety of Their Termination From Collective Bargaining Unit Positions.

Section 301 confers original jurisdiction upon the federal district courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ." The statute is both a jurisdictional grant and a mandate for the development and application of federal substantive law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

As recently noted in *Franchise Tax Board*, this Court has long encouraged an expansive reading of the scope of Section 301 with respect to the types of agreements it governs and the parties who may sue under its aegis. 463 U.S. at 25 n.28. A narrow reading of the statute would "stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith v. Evening News Association*, 371 U.S. 195, 200 (1962)

(individual grievances by bargaining unit employees governed by Section 301).

This case, however, does not require the Court to venture to the outer boundaries of Section 301 jurisdiction. Respondents' claim for breach of contract is "really" an action to enforce the terms of the collective bargaining agreement. The Ninth Circuit's decision ignores the fact that the gravamen of respondents' complaint is that they were wrongfully discharged from a collective bargaining unit position — a claim long recognized as one "arising under" Section 301 and one subject to grievance and arbitration if (as here) the labor contract contains such provisions. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

Respondents' status as collective bargaining unit employees is undisputed: in Paragraphs 10-26 of the Complaint they admit that at the time of their discharge (and for a substantial period of time prior thereto) they were hourly employees. In Paragraph 29 they acknowledge that hourly employees were covered by a collective bargaining agreement. Article 10 of the applicable collective bargaining agreement provides that termination of covered employees shall only be for "just cause." The same article also provides that binding arbitration is the exclusive remedy for disputes over termination. If, as they claim, respondents should not have been discharged because of individual promises of "permanent employment," then their discharge was not for "just cause," as required by the collective bargaining agreement. Respondents have alleged a breach of the collective bargaining agreement, which arises under Section 301 and which is remedied exclusively by the binding grievance and arbitration provisions set forth in the collective bargaining agreement.

B. The Ninth Circuit's Interpretation of the Collective Bargaining Agreement Impermissibly Intruded on the Arbitrator's Role.

The Ninth Circuit erred in concluding that the rights and obligations asserted by respondents do not originate in the labor agreement. The Ninth Circuit determined that respondents' claim of "permanent employment" is extraneous to the collective bargaining agreement because the express terms of the agreement do not, in fact, provide respondents the "permanent employment" guarantee they assert was granted them individually. *Williams v. Caterpillar Tractor Co.*, 786 F.2d at 935. The issue, however, is not whether the four corners of the collective bargaining agreement actually provide respondents guarantees of "permanent employment." Instead, the issue is whether respondents' claim of wrongful discharge based on individual promises of permanent employment invokes the "just cause" discharge (or other) provisions of the collective bargaining agreement, and consequently, the grievance and arbitration remedies contained therein.

This Court has long prohibited state and federal courts from doing exactly what the Ninth Circuit did in this case, namely, interpreting substantive provisions of a collective bargaining agreement when the parties have agreed to submit such disputes to arbitration. *See AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. _____, 106 S. Ct. 1415 (1986); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Wisconsin Supreme Court had similarly taken upon itself the task of interpreting the applicable collective bargaining agreement and had concluded that the agreement contained no express and created no implied requirement for prompt payment of disability insurance benefits. Based on its construction of the contract, the Wisconsin court permitted an employee to sue in common

law tort for bad faith breach of contract based on a delay in processing his insurance payments, because the Wisconsin court presumed the obligations stated by the tort were extraneous to the collective bargaining agreement. *Id.* at 207. On appeal, however, this Court determined that the plaintiff's sole remedy was for breach of the collective bargaining agreement:

> "The assumption that the labor contract creates no implied rights is not one that state law may make. Rather it is a question of *federal contract interpretation* whether there was an obligation under this labor contract to provide the payments in a timely manner .... There is no reason to assume that the labor contract *as interpreted by the arbitrator* would not provide such relief." *Id.* at 215 (emphasis added).

As this Court noted, "perhaps the most harmful aspect of the Wisconsin decision" was its usurpation of the role of the arbitrator "who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220.

The Ninth Circuit confined its interpretation of the collective bargaining agreement to the express language of the agreement, finding that it did not provide respondents the "permanent employment" they allegedly were promised. But as this Court has repeatedly emphasized, traditional contract analysis does not apply to a collective bargaining agreement because such an agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen could not wholly anticipate." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (hereinafter "*Warrior & Gulf Navigation Co.*"). Respondents assert that their alleged individual promises are part of a "total employment relationship" which is somehow extraneous to the collective bargaining agreement. That argument ignores the rule that the collective bargaining agreement governs the "whole employment relationship." *Id.* at 579. The arbitrator performs functions "which are not normal

to the courts" and his source of law "is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-83.

It has been stated that "[t]he concept of collective bargaining ... includes ... the negotiation of the collective agreement and the settling of the terms of the individual contracts." *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 466 (1955) (Douglas, J., dissenting).[2] *How* respondents' alleged individual promises were "settled" is the key factual issue presented in this dispute. That question necessarily involves an evaluation of the bargaining history and the practice of the industry as well as construction of the just cause discharge and plant shutdown provisions of the collective bargaining agreement. Respondents have admitted, in fact, that the bargaining history is directly relevant to the instant case. In their Opposition to the Petition for Writ of Certiorari (at p. 8), respondents acknowledged that resolution of this dispute will necessitate "evidence as to whether either Caterpillar or the union made any effort to negotiate into any labor agreement the rights which Respondents acquired while they were holding non-union jobs with Caterpillar." These issues are uniquely appropriate for the arbitrator's determination. Arbitrators, and not courts, are versed in the law of the shop and industry practice and are skilled in analyzing bargaining history. They provide, therefore, the forum of choice for interpretation of a collective bargaining agreement. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

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[2]In *Smith v. Evening News Association*, 371 U.S. 195, 198-99 (1962), the Court rejected the majority holding in *Westinghouse* that Section 301 jurisdiction did not extend to grievances by bargaining unit employees based on individual "hiring contracts."

Several lower federal courts, each considering actions removed from state court, have correctly determined that collective bargaining unit employees' wrongful discharge claims based on violation of "independent" state law rights and obligations are, in fact, actions to enforce the just cause provisions of the collective bargaining agreement. These courts found, therefore, that the state law claims were subject to the grievance and arbitration provisions of that agreement, and stated, if anything, claims arising under Section 301.

In *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), for example, the court upheld removal of a wrongful discharge action ostensibly based on state law. Plaintiff alleged that he had "individual" promises of employment derived from various sources "independent" of the collective bargaining agreement, including the employer's personnel manual. The *Olguin* court found that any "independent" agreement could only be effective as part of the collective bargaining agreement and that plaintiff's claim was "effectively a suit to enforce the collective bargaining agreement." *Id.* at 1474.

In *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 863 (1986), former bargaining unit employees disputing their layoffs claimed that their employer promised them their plant would continue operating in order to induce them to stay on the job. The action was ostensibly based on state law contract and fraud theories. Citing this Court's opinion in *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491-92 (1972), the circuit court determined that the broad arbitration clause in the collective bargaining agreement encompassed the allegedly "extrinsic" claims of fraud and breach of an "independent" contract. The *Mason* court concluded that "[o]n analysis . . . the claim is for termination of employment, wrongful because the employer had

represented the employment would continue." *Id.* at 1224.

And in *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984), the plaintiff, like respondents, brought an action in state court for damages for breach of an individual employment contract for "lifetime employment" allegedly entered into before he was hired by defendant employer and before the terms of his employment became covered by a collective bargaining agreement.

The Fifth Circuit upheld removal, although the complaint on its face did not refer to a collective bargaining agreement. Relying on *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) and *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), the Fifth Circuit determined that, as a matter of substantive federal law, the plaintiff's alleged "independent" contract for lifetime employment was subsumed into and preempted by the collective bargaining agreement because it sought "to 'limit or condition' the terms of the collective bargaining agreement, which established the terms and conditions of employment, including discharge." 730 F.2d. at 363 (quoting *J.I. Case Co. v. NLRB*, 321 U.S. at 337). The *Eitmann* court noted that defendant's preemption argument was not a defensive allegation; the powerful preemptive effect of Section 301 displaced any "artfully pleaded" state law claims. *Id.* at 366. The *Eitmann* court determined that the action "arose under" Section 301, and that the court had original subject matter jurisdiction over the matter. *Id.* at 365-66.[3]

[3]In *Eitmann*, the court made simultaneous findings that the alleged individual promises were nullified as a matter of law by the collective bargaining agreement and that the purported state law claim arose under Section 301, thereby giving rise to original federal jurisdiction. Amici curiae do not dispute the propriety of these concomitant findings but submit that the issue of the survival of the "individual" promises need not be resolved in order to find that the claims set forth herein are "really" federal law claims.

C. The Ninth Circuit Misconstrued the Arbitration Clause in the Collective Bargaining Agreement.

That Congress has established arbitration as the remedy of choice in labor disputes is an unassailable proposition. Labor-Management Relations Act, 29 U.S.C. § 173(d).[4] Because federal labor policy mandates arbitration as the primary means of achieving industrial peace, arbitration clauses are to be broadly construed in favor of coverage of a particular dispute. Unless "specifically excluded" from the arbitration clause, "all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement" and "[d]oubts should be resolved in favor of coverage." *Warrior & Gulf Navigation Co.*, 363 U.S. at 581, 583.

In a cursory footnote, the Ninth Circuit construed the arbitration clause in the collective bargaining agreement narrowly and found that it did not apply to "matters collateral to the agreement such as independent individual contracts." *Williams v. Caterpillar Tractor Co.*, 786 F.2d at 936 n.4. This conclusion belies the broad scope of the applicable arbitration clause. Article 10.1 of the collective bargaining agreement, the grievance and arbitration provision, extends to "any difference" between Caterpillar and its employees covered by the agreement as to "[a]ny matter" involving the terms and conditions of employment set forth therein. The grievance remedy also applies to "[a]ny matter" involving "the application or interpretation of any provisions" of the agreement. Respondents' claim for breach of contract gives rise to an arbitrable dispute over the "meaning" and "applicability"

It should be noted that the Eighth and Eleventh Circuits have recently issued decisions in which related claims for fraud and breach of "pre-hire" agreements were found to be outside the scope of Section 301. *See Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986); *Varnum v. Nu-Car Carriers, Inc.*, No. 85-3898, slip op. (11th Cir. Nov. 20, 1986). Neither case addressed the issue of Section 301 jurisdiction because both actions were removed to federal court on the basis of diversity of citizenship. However, the courts found the state law claims not subject to Section 301 preemption, thereby impliedly finding as well that they were not Section 301 claims. Both decisions rely on this Court's holding in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), which, as discussed, *infra*, concerns a different class of plaintiffs whose claims for misrepresentation raised no Section 301 issue since they were "innocent third parties" and not collective bargaining unit employees. In addition, a different panel of the Eleventh Circuit has found "extrinsic" fraud claims based on alleged promises of "permanent employent" subject to the grievance and arbitration provisions of a collective bargaining agreement. *Mason v. Continental Group, Inc.*, 763 F.2d at 1224 (discussed *supra*). *See also Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986) (sole remedy for former bargining unit employee disputing his discharge was for breach of the collective bargaining agreement); *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985) (plaintiff/employee disclaiming reliance on his collective bargaining agreement and asserting he was terminated for refusing to perform tasks in violation of statutory safety regulations stated an action for wrongful discharge, which was governed by the applicable collective bargaining agreement and Section 301).

[4]This Court has recognized only narrow exceptions to the rule which makes grievance and arbitration the exclusive remedies when the contract so provides. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (bargaining unit employee not barred by grievance and arbitration procedures from bringing suit for violation of Title VII); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (bargaining unit employee may bring private action to enforce provisions of Fair Labor Standards Act); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) (bargaining unit employee may bring action under Civil Rights Act of 1871). None of these exceptions obtains here. In *Allis-Chalmers*, the Court explained that *Gardner-Denver* was based on a distinction between "rights which could be waived by contract between the parties, on the one hand, from an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement, on the other." *Allis-Chalmers*, 471 U.S. at 213 n.8. Here, respondents' alleged right to "permanent employment" is purely of contractual origin. The asserted right in this case, then, can be "avoided" as well as created by contractual agreement.

of express provisions of the contract, including grounds for discharge and the effects of plant shutdown.

Similarly broad arbitration provisions have been accorded an expansive scope by this Court and lower federal courts. *See, e.g., Warrior & Gulf Navigation Co.*, 363 U.S. at 583, 585 (arbitration clause extending to "any difference" as to the meaning or application of the agreement held to cover dispute over subcontracting, which was not expressly addressed in collective bargaining agreement); *Mason v. Continental Group, Inc.*, 763 F.2d at 1224 (grievance clause covering "any difference" with regard to interpretation, application or compliance with the agreement held to extend to "extrinsic" fraud and breach of "independent" contract claims).

Claims regarding the propriety of discharge are "grist" for the arbitration mill.[5] *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). Contrary to the Ninth Circuit's opinion, allegations of "independent" promises or "individual" employment agreements do not alter the arbitrability of a discharge dispute. *See, e.g., Mason v. Continental Group, Inc.*, 763 F.2d at 1224. Such issues are not foreign to arbitrators. *See, e.g., Braniff, Inc.*, 84 L.A. 1270 (White, 1985) (airline employer's individual weight agreement with overweight flight attendant unenforceable because individual agreement violates recognition clause of collective bargaining agreement); *Schnadig Corp.*, 83 L.A. 61 (Traynor, 1984) (settlement agreement between employee and employer which violated terms of collective bargaining agreement invalid); *Armco Inc.*, 79 L.A. 330 (Wren, 1982) (oral promise by supervisor that employees retained seniority upon transfer to new mine invalid because it contradicted collective bargaining agreement). Arbitrators, in fact, have enforced individual promises in certain circumstances. *See, e.g., U.S. Pipe & Foundry Co.*, 54 L.A. 820 (Jones, 1970) (supervisor's promise of extra vacation pay to individual employee enforced).

[5]According to a recent sample survey, 94% of collective bargaining agreements contained provisions regarding grounds for discharge (*e.g.*, "just cause") and 100% included grievance and arbitration provisions. 2 *Collective Bargaining Negotiations and Contracts* (BNA) 40:1, 51:1 (1986). Statistics compiled by the Federal Mediation and Conciliation Service ("FMCS") indicate that in fiscal year 1981, 6,817 arbitration awards were issued under FMCS auspices regarding interpretation of the terms of collective bargaining agreements. Of these, virtually one-half involved discharge or discipline of employees. *See* 34th FMCS Ann. Rep. at 39, 41 (1982) (FMCS cases accounted for only a small portion of all collective bargaining agreement discharge arbitrations).

Arbitration to determine whether there was cause for discharge has become a routine occurrence in American industrial life. Such arbitrations operate as a fair and efficient means of quickly and finally resolving workplace disputes. The arbitral process is the alternative to economic warfare. *Warrior & Gulf Navigation Co.*, 363 U.S. at 578. The Ninth Circuit's decision, which undermines that process, minimizes industry's ability to solve disputes internally and increases the opportunity for greater industrial strife.[6]

[6]In their arguments below, respondents relied substantially on *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). In that case, the Court recognized the right of strike replacements, who were discharged when strikers returned, to bring a state action for breach of contract based on promises of permanent employment. *Belknap* did not involve Section 301 claims. As the Fifth Circuit noted in *Eitmann*, *Belknap* is not dispositive in cases such as the instant matter, because the *Belknap* plaintiffs were not covered by a collective bargaining agreement and could not bring an action under Section 301:

> "Where, as [in *Eitmann*], an employee who is covered by the collective bargaining agreement seeks to redress a grievance subject to its terms, and seeks a remedy awardable by the arbitrator, we think it is clear that his avenue lies in the procedure provided by the collective bargaining agreement." 730 F.2d at 364.

D. Respondents Cannot Avoid Federal Jurisdiction By Avoiding Reference to Federal Law in the Complaint.

Respondents' complaint attempts to defeat original federal jurisdiction by carefully (and expressly) sidestepping reliance on the provisions of the applicable collective bargaining agreement, and by omitting mention of Section 301. However, "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint . . . ." *Franchise Tax Board*, 463 U.S. at 22. *See also Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

Thus, ostensible state law claims may be recharacterized as Section 301 claims regardless of whether the plaintiff makes a specific reference to Section 301 or to a collective bargaining agreement in the complaint. *See, e.g., Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557 (1968).

As this Court explained the *Avco* decision in *Franchise Tax Board*, the preemptive force of Section 301 is distinctively powerful. Its assertion as a ground for removal is not "defensive." Section 301 completely preempts state law claims which come within its scope and is the *only* remedy available for claims within its scope. Such claims "really" and necessarily arise under Section 301. *Id.* at 24.

Relying almost entirely on interpretations of its own case authority (*Hunter v. United Van Lines*, 746 F.2d 635 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S. Ct. 180 (1985); *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984)), the Ninth Circuit concluded that Section 301 did not supplant the state law causes of action in this case, because the court believed that the collective bargaining agreement did not provide a remedy for breach of a promise for permanent employment. Not only does this conclusion impermissibly intrude on the arbitrator's role, the Ninth Circuit also assumed erroneously that federal law must provide a remedy for the precise state cause of action alleged before a cause of action necessarily arises under federal law. As set forth in detail in Petitioner's Opening Brief, this Court has never conditioned federal jurisdiction on such a finding. At any rate, respondents had a remedy — they could have grieved their discharge based on the same allegations in their complaint. Their breach of contract action, then, is simply a federal law claim in state law clothing.

See also Anderson v. Ford Motor Co., 803 F.2d 953, 960-61 (8th Cir. 1986) (dissent) (*Belknap* not applicable to claims by collective bargaining unit employee); *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589, 591 (6th Cir. 1986) (same).

II

A SUBSTANTIAL FEDERAL QUESTION IS AN ESSENTIAL ELEMENT OF RESPONDENTS' CLAIMS.

Even if respondents' breach of contract claim is not "really" a Section 301 claim, removal was still proper because a substantial federal question is an essential element of respondents' right to relief under their claim for breach of contract.[7]

A. Removal is Proper if a Substantial Federal Question is an Essential Element of One of the Claims in a Complaint.

It is well settled that original federal jurisdiction may be exercised over a claim grounded in state law when "some substantial, disputed question of federal law is a

[7]Again, because only one of the claims for relief need invoke a federal question, the focus of Part II of this brief is on respondents' breach of contract claim, although similar arguments apply to the remaining tort claims. *See* footnote 11, *infra*, p. 22.

necessary element of one of the well-pleaded state claims. . . ." *Franchise Tax Board*, 463 U.S. at 13. *See also Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. ____, 106 S. Ct. 3229, 3235 (1986). In determining when an element is "essential," this Court has analyzed several factors, including the likelihood that the federal question will be raised and the prominence of the federal issue in the litigation. *Gully v. First National Bank*, 299 U.S. 109, 117 (1936). If a plaintiff's right to relief depends solely on state law, and the federal question only poses a conjectural defense to enforcement of the state law right, the federal question is merely "lurking in the background" of that litigation. *Id.* at 117. On the other hand, if plaintiff's very right to recovery depends on resolution of a federal issue, the federal question without doubt will be "essential" to the state law claim. *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921).[8]

In *Smith v. Kansas City Title & Trust Co.*, a shareholder sued under Missouri law to enjoin a trust company from investing in federal bonds. The shareholder alleged that

[8]A uniform test for "necessary element" cases has eluded the federal courts; in fact, this Court has looked with disfavor on any rigidly applied guidelines. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. at 3233; *Gully v. First National Bank*, 299 U.S. at 117. This Court has indicated that state law causes of action may "arise under" federal law when plaintiff's case "depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another," *Northern Pacific Ry. v. Soderberg*, 188 U.S. 526, 528 (1903), or, " 'if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law.' " *Franchise Tax Board*, 463 U.S. at 9 (quoting P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 889 (2d ed. 1973)). "Arising under" jurisdiction is supported when "pragmatic considerations make it eminently logical and sensible that the forum for such a dispute be the federal district court." *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 328 (2d Cir. 1982), *aff'd* 463 U.S. 1220 (1983). *See also Franchise Tax Board*, 463 U.S. at 21.

the federal statute authorizing issuance of the bonds was unconstitutional. Although the cause of action was state created, this Court held that the case nonetheless arose under federal law because the constitutionality of the federal statute was "directly drawn in question." *Id.* at 201. *See also Hopkins v. Walker*, 244 U.S. 486 (1917) (plaintiff's state law action to clear title to land obtained under a federal mining patent stated federal jurisdiction where defendants had challenged the validity of the patent, thereby requiring construction of federal mining laws); *Northern Pacific Ry. v. Soderberg*, 188 U.S. 526 (1903) ("arising under" jurisdiction found in suit under state law to enjoin removal of granite from land where plaintiff's title to such land rested upon a construction of the federal Land Grant Act of 1864); *Christopher v. Cavallo*, 662 F.2d 1082 (4th Cir. 1981) (federal question jurisdiction found where plaintiff's state law breach of warranty claim required construction of federal copyright law).

Where this Court has refused to find federal jurisdiction over a state claim, the asserted federal issue was not a substantial element of the plaintiff's prima facie cause of action and would have arisen merely as a defense to enforcement of a state law right. *See Franchise Tax Board*, 463 U.S. at 13-14 (state action by California's Franchise Tax Board to enforce a tax levy on funds held in trust in a vacation benefit plan was not within the removal jurisdiction conferred by 28 U.S.C. § 1441; federal law would be raised only in defense to enforcement of the levy). *See also Gully v. First National Bank*, 299 U.S. at 117 (Mississippi tax authority's state law contract action against national bank improperly removed; federal issue concerning the power of states to tax national banks was defense of defendant bank and not essential element of plaintiff's cause of action).

B. Analysis of the Collective Bargaining Agreement is an Essential Element of Respondents' Claim for Breach of Contract.

Respondents claim that their discharge breached an implied-in-fact agreement for "permanent" employment.[9] Respondents cannot establish a prima facie case for this cause of action without resolving the issue of the preemptive effect of the collective bargaining agreement on the purported individual promises of permanent employment. Both the construction of the collective bargaining agreement and its effect on the individual promises are governed by federal law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944). Accordingly, a "substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims."[10]

California Labor Code Section 2922 sets forth a presumption of at-will employment for employment of an unspecified duration. An exception has been recognized where the parties' conduct has resulted in an implied-in-fact agreement requiring just cause for termination. In the seminal case setting forth the elements of such a claim, the California Court of Appeal determined that

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[9]At one point in the complaint (Paragraph 29) respondents refer to their agreement for "permanent employment" as "express." It is clear, however, that if respondents have set forth any state law cause of action, it is for breach of an implied-in-fact contract. *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984) (alleged oral and written promises that plaintiff would not be terminated without good cause treated as claim for breach of implied-in-fact contract).

[10]Whether the federal issue is viewed as a construction of Section 301 or the federal common law evolved therefrom, federal question jurisdiction is stated. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, ____, 105 S. Ct. 2447, 2451 (1985) (federal common law gives rise to original subject matter jurisdiction to the same extent as federal statutes).

whether the exception applies depends upon a consideration of "the totality of the parties' relationship: Agreement [to such a promise] may be 'shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances.'" *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981) (quoting *Marvin v. Marvin*, 18 Cal. 3d 660, 678 n.16, 134 Cal. Rptr. 815, 827 n.16 (1976)). California courts have recognized that a variety of factors, including statements of superiors, personnel manuals and the policies and practices of the employer, make up the "totality of the parties' relationship." *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d at 327, 171 Cal. Rptr. at 925-26. *See also Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); *Walker v. Northern San Diego County Hospital District*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982).

In their complaint, respondents have alleged several factors to support the existence of an implied-in-fact promise of discharge only for just cause: favorable performance evaluations, oral reassurances of continued employment, lack of criticism, and personnel manuals, policies and practices which allegedly suggest discharge will not be arbitrary. One necessary element of the "totality of the parties' relationship" which the respondents studiously avoid is the collective bargaining agreement. Respondents may not ignore that agreement in establishing their prima facie case.

In *Shapiro v. Wells Fargo Realty Advisors*, the plaintiff alleged, *inter alia*, an implied-in-fact promise of continued employment based on oral representations and company benefit brochures suggesting that he could be terminated only for cause. One year after beginning employment, plaintiff signed an agreement which expressly defined the terms of his employment as terminable at-will. 152 Cal. App. 3d at 473, 199 Cal. Rptr. at 615-16. The California Court of Appeal, relying on *Pugh*, determined that the

plaintiff must put forth all the circumstances of his employment to establish a prima facie case of an implied-in-fact contract between the parties. *Id.* at 481-82, 199 Cal. Rptr. at 621. The court analyzed several factors in the employment relationship and found the written agreement, over which it took judicial notice, controlling. As a result of the express agreement, the court held that plaintiff had failed to establish a prima facie case.

As in *Shapiro*, the collective agreement between the respondents and their employer defined the terms of their employment relationship. Respondents cannot pick and choose among the factors that reflect the "totality" of the employment relationship, simply because they want to escape the terms of the collective bargaining agreement. A fundamental element in respondents' prima facie case for breach of implied-in-fact contract will be an analysis of the collective bargaining agreement and its preemptive effect on the purported individual promises. Because federal labor law governs the interpretation of the collective bargaining agreement, federal authority, in particular this Court's decision in *J.I. Case*, will determine if respondents may assert a claim based on alleged independent oral promises concerning terms and conditions of employment which are subject to mandatory collective bargaining and which have been collectively bargained.[11]

[11]As to respondent's remaining claims, similar consideration of the "totality" of the employment relationship is required to establish an implied covenant of good faith and fair dealing which provides for just cause termination. *See Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d at 478-79, 199 Cal. Rptr. at 619. And in order to prove their misrepresentation claim, respondents "would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts" they allegedly made. *Bale v. General Telephone Co.*, 795 F.2d 775, 780 (9th Cir. 1986). Finally, the claim for intentional infliction of emotional distress is grounded in the allegedly wrongful conduct set forth in the other causes of action. Resolution of this claim, too, will implicate the collective bargaining agreement because the "wrongfulness" of Caterpillar's conduct depends upon an issue of federal law — the viability of the purported individual promises of permanent employment in light of the collective bargaining agreement.

The effect of the collective bargaining agreement on respondents' purported individual promises of permanent employment is the "real substance of this controversy." *Gully v. First National Bank*, 299 U.S. at 114. The federal question in this case is neither a defense nor a "conjectural" issue "lurking in the background." It is the fulcrum of respondents' right to relief which "will be supported if [federal labor laws] are given one construction or effect, and defeated if they receive another." *Id.* at 112.

III

THE NINTH CIRCUIT'S DECISION UNDERMINES NATIONAL LABOR POLICY.

Disputes about federal jurisdiction "require sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. ____, 106 S. Ct. 3229, 3233 (1986). The Ninth Circuit's refusal to acknowledge federal jurisdiction in this case undermines what has long been recognized as a "congressional mandate" to develop a national labor policy which recognizes that "the subject matter of §301(a) 'is peculiarly one that calls for uniform law' " *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (quoting *Pennsylvania Ry. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919)).

This congressional mandate is best served when claims such as respondents' are deemed "really" ones of federal law, as set forth in Part I of this brief. Not only is the arbitrator given his rightful place at the center of "industrial self-government," deferral to arbitration also furthers "interpretive uniformity and predictability." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211, 219 (1985).

Alternatively, if respondents' claims are not deemed Section 301 claims, "interpretive uniformity and predictability" are still served when labor disputes such as respondents' are resolved in federal court. With particular reference to federal labor law, the Court has expressly acknowledged that "[r]emoval is . . . one aspect of 'the primacy of the federal judiciary in deciding questions of federal law.' " *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557, 560 (1968) (quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16 (1964)). This Court has also recognized that federal courts may have particular expertise in the interpretation of federal law, which is accessed by removal of cases from state court. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 246-47 (1970).

As a result of the Ninth Circuit's decision, employers and unions face the prospect that protracted state court litigation over labor disputes will become commonplace. The spectre of lengthy litigation, while troublesome,[12] is

[12]Arbitration is a preferred remedy for the resolution of labor disputes, in part, because it settles such disputes efficiently and expeditiously. *See Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. at 248. Traditional litigation in state court is not an efficient method to settle employment disputes such as respondents'. For example, in *Alpha Beta, Inc. v. Superior Court*, 180 Cal. App. 3d 324, 225 Cal. Rptr. 551 (1986) (review granted July 24, 1986, No. SF 25039), plaintiff brought state tort causes of action against her employer for alleged mistreatment in her bargaining unit position. Virtually all of plaintiff's charges concerned terms and conditions of employment governed by the collective bargaining agreement. The California Court of Appeal ultimately upheld the trial court's denial of the employer's motion for summary judgment, which was based on federal preemption of the state tort claims. The California Supreme Court denied review. *Id.* at 327-28, 225 Cal. Rptr. at 552-54.

The employer then filed a petition for writ of certiorari with this Court, which granted the petition and vacated the decision of the California Court of Appeal. In remanding the case, this Court

not the most damaging effect of the Ninth Circuit's decision. The loss of federal court and arbitration forums gives rise to the possibility that individual contract terms might have different meanings under state and federal law, which would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

Individual bargaining unit employees such as respondents have not hesitated in their efforts to take advantage of recent developments in common law wrongful discharge litigation, which, in many jurisdictions, have eroded the traditional employment at-will doctrine.[13] In an attempt to divorce themselves from their collective bargaining agreement and the remedies provided therein, bargaining unit employees such as respondents have asserted causes of action for breach of purported "individual" employment agreements and related tort actions. If the decision below stands, it is inevitable that many bargaining unit employees, unhappy with their collectively bargained agreement, will abandon the grievance

directed the Court of Appeal to reconsider its opinion in light of the Court's most recent analysis of federal labor law preemption, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). *Alpha Beta, Inc.*, 180 Cal. App. 3d at 327, 332-33 n.1, 225 Cal. Rptr. at 552-53, 557 n.1.

The California Court of Appeal merely reissued its original decision, with a brief footnote disclaiming the applicability of *Allis-Chalmers* to the case before it. Yet the Court of Appeal flatly admitted that the collective bargaining agreement would be "implicated" to the extent plaintiff's causes of action depended on whether the labor contract was followed or disregarded. *Id.* at 334, 225 Cal. Rptr. at 558. The employer's request for hearing before the California Supreme Court has been granted, some four years after plaintiff filed her action.

[13]*See* Lopatka, *The Emerging Law of Wrongful Discharge — A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law 1 (1984); Stieber, *Recent Developments in Employment-at-Will*, 36 Lab. L.J. 557 (1985).

and arbitration provisions of those agreements and sue directly in court. They may also deny defendants their right to a federal forum by suing in state court and artfully pleading "individual" employment agreements. The result will be a significant upswing in the number of cases in state courts — and a concomitant increase in the number of appeals before this tribunal. Arbitration — the most appropriate forum for such disputes — will be largely ignored.

CONCLUSION

The Ninth Circuit's determination that removal was improper in this case is at odds with the language of Section 301, is antithetical to Congress' intent in enacting Section 301 and is repugnant to long standing principles of federal labor law articulated by this Court. For the foregoing reasons, amici curiae respectfully submit that the decision below should be reversed.

Dated: January 16, 1987.

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
F. CURT KIRSCHNER, JR.
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Amici Curiae, Merchants and Manufacturers Association and California Employment Law Council

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 16, 1987, I served the within Amici Curiae Brief in re: "Caterpillar Inc., et al. vs. Cecil Williams, et al." in the United States Supreme Court, October Term 1986, No. 86,526; on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Fritz Wollett
McCartin & Wollett
1760 Solano Avenue, Suite 306
Berkeley, California 94707-2296

Gerald D. Skoning
Seyfarth, Shaw, Fairweather
& Geraldson
55 East Monroe Street
Chicago, Illinois 60603

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 16, 1987, at Los Angeles, California

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